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DECISIONS

OF THE

SUDDER DEWANNY ADAWLUT,

NORTH WESTERN PROVINCES,

FOR 1851.

RECORDED IN ENGLISH,

IN

CONFORMITY TO ACT XII. 1843.

VOL. VI.

AGRA:

PRINTED AT THE SECUNDRA ORPHAN PRESS.

1852,

Rec. Oct. 24, 1900.

CONTENTS FOR JANUARY.



	<i>Pages.</i>
Purgash Rai, (Plaintiff), Appellant, <i>versus</i> Sheogobind, tewardree, (Defendant), Respondent. Claim, to set aside a sale of certain shares of an Estate, on the grounds that, according to Hindoo Law, the seller could not legally alienate the property. Lower Court's dismissal of claim, as barred by lapse of time, upheld, the argument of the appellant, that a conditional sale is an incomplete transaction, and cannot constitute a ground of action until the sale has become absolute, being rejected, it being held that the cause of action must be considered to have arisen at the time of the transfer, the rendering of the sale absolute being a mere consequence depending upon the original transfer, and not a separate transaction by itself, ...	1
Balmokund, (Defendant), Appellant, <i>versus</i> Baboo Jankee Dass, (Plaintiff), Respondent. Claim, laid in the Zillah Court of Benares, to bring to sale certain rights and interests in land situated in the district of Mirzapore, which was decreed by the Zillah Court, but reversed in appeal, it being held that the suit was only cognizable in the Court of the Zillah in which the property was situated, and in which the defendant, as purchaser of the disputed property, is resident, ...	3
Hurnam Rai and others, (Defendants), Appellants, <i>versus</i> Bishumbur Rai and others, (Plaintiffs), Respondents. Remanded, the decisions of the lower Court being held to be incomplete and defective, as the plea of champerty, advanced in those Courts by the defendants, was left unadjusted, ...	5
Mewa Ram, (Defendant), Appellant, <i>versus</i> Rajah Teekum Singh, (Plaintiff), Respondent. Plaintiff, as talooquadar, sues for reversal of sale on account of arrears of revenue, on ground that the parties held no pro-	

prietary right, and the lower Courts gave a decree in his favor, but which decision is reversed, it being held that no claim of right founded on any act of the original engager, or any plea impeaching the title by which the said engager may have held, shall be allowed to impugn the right of the revenue authorities to make the sale, or to bar or affect the title and interest conveyed to the purchaser by the sale, in other words, the purchaser at a sale for arrears of revenue purchases a title which is not liable to impeachment, ..	7
Brij Lall, (Plaintiff), Appellant, <i>versus</i> Byjoo, <i>nack</i> , and others, (Defendants), Respondents. Case decided on a <i>soolehnamah</i> put in by the vakeels of the respective parties, ..	9
Hoolasee Singh and others, (Plaintiffs), Appellants, <i>versus</i> Teekaram and others, (Defendants), Respondents. Remanded, the lower Court having summarily and without enquiry disposed of the plea of the plaintiff, that the <i>punchayet</i> formed by order of revenue authorities did not act in conformity to the rules laid down in Section 7, Regulation IX. 1833, ..	10
Pirbhoo Lall, (Defendant), Appellant, <i>versus</i> Noor Khan, (Plaintiff), Respondent. Civil Courts cannot entertain an action for the reversal of orders passed by the Criminal authorities under Act XXI. 1841, ..	11
Moortiza Khan, (Defendant), Appellant, <i>versus</i> Wuzeer Ali and another, (Plaintiffs), Respondents. Remanded to Court of original jurisdiction, the plea of illegitimacy advanced by the defendant having been left unadjudicated, thus rendering the decisions incomplete, ..	12
Lall Pokpal Singh, (Defendant), Appellant, <i>versus</i> Mussumat Rancee Sengur and others, (Plaintiffs), Respondents. Remanded, a full enquiry into the merits of the case not having been made, and remarking on the very unsatisfactory nature of the proceedings in the Principal Sudder Ameen's Court, ..	13
Surrubsookh Rai, (Plaintiff), Appellant, <i>versus</i> Ahmud Shah and others, (Defendants), Respondents. Claim, recovery of value of timber alleged to have been taken away by the defendant. Decision of the lower Courts, with certain modifications as to the costs, which is regulated by the amounts decreed and dismissed, upheld, ..	15

Dookhit, kulwar, (Defendant), Appellant, <i>versus</i> Syed Faqueer Hoossein, (Plaintiff), Respondent. Claim, right of preëmption,—remanded, the Judge having set aside the decision of a Court of original jurisdiction, dismissing the claim, on ground of the plaintiff having failed to observe the necessary forms of law, without trying this point, without which the decision could not be set aside, ...	17
Muttur Singh and another, (Plaintiffs), Appellants, <i>versus</i> Hurshunker Singh and others, (Defendants), Respondents. Dismissal of claim by Principal Sudder Ameen, holding that the claim should have been preferred within 12 years from the date on which the estates were placed under <i>kham</i> management by the Collector, and not from date on which the defendant was admitted to engage as proprietor, overruled, and suit remanded for trial on merits, ...	19
Oodoo Singh, (Defendant), Appellant, <i>versus</i> Mussumat Hur Koonwur, (Plaintiff), Respondent. Non-registry of names does not deprive a person of his <i>zemin-daree</i> rights, and on his own shewing, the Principal Sudder Ameen ought to have dismissed the plaintiff's instead of decreeing in his favor, ...	20
Ruttoo Sahoo, (Plaintiff), Appellant, <i>versus</i> Sustee Ram and others, (Defendants), Respondents. Section 20 of Regulation VII of 1822 does not confer the power on Collectors of remodelling arrangements previously made under Section 10, ...	21
Thakoor Bhowannee Buksh and others, (Plaintiffs), Appellants, <i>versus</i> Oogun, tewartree, (Defendant), Respondent.—Claim, redemption of an Estate. Ruled, that as the conditional sale under the deed produced in the Moonsiff's Court became absolute in 1804, the provisions of Regulation XVII of 1806, which are declared by Construction No. 672 not to have retrospective effect, do not apply, the Moonsiff's decision, therefore, declaring the plaintiffs' right to redeem had not been lost, was clearly wrong, ...	22
Ramputt, (Defendant), Appellant, <i>versus</i> Allyjoo, (Plaintiff), Respondent.—Claim, to recover the price of goods, and the amount of loss sustained by the non-delivery. Lower Court's decision amended as regards costs, which was awarded on total amount of claim, though a portion had been disallowed, ...	23

	<i>Pages.</i>
Mussumat Bolee Beehee and others, (Plaintiffs), Appellants, <i>versus</i> Hoossein Buksh Khan and others, (Defendants), Respondents.—Claim, for recovery of certain shares of ancestral property in land, remanded, dismissal of claim by lower Court under law of limitation being overruled, ...	24
Rajah Odeynarain Mull, (Plaintiff), Appellant, <i>versus</i> Thakoor Singh and others, (Defendants), Respondents.—Decision of claim under law of limitation upheld, ...	27
Seetul Buksh, (Plaintiff), Appellant, <i>versus</i> Adhar Singh and others, (Defendants), Respondents.—The period of dispossession not having been determined by the lower Court this case is remanded as incomplete, . .	28
Moulvee Gholam Hoossein and others, (Plaintiffs), Appellants, <i>versus</i> Shah Muhboob Allum and others, (Defendants), Respondents.—Claim, to recover the rent of a field, which the Moonsiff finds the plaintiffs have collected, and accordingly decrees in their favor: the Principal Sudder Ameen however nonsuits, and directs the plaintiff to establish their right to the field before they can sue for rent; but as the issue is as to whether they were in possession and had received rents previously, the case was remanded, the order for a nonsuit being reversed, ...	30
Ghoolam Hussun, (Plaintiff), Appellant, <i>versus</i> Jum-oolah, (Defendant), Respondent.—Remanded, the Principal Sudder Ameen having omitted to try an important plea urged by the defendant, ...	31
Baboo Moona Lall and others, (Plaintiffs), Appellants, <i>versus</i> Gungapershad, and others, (Defendants), Respondents.—Claim, to obtain redemption from mortgage: dismissal of claim by lower Court upheld, ...	32
Ooderaj, (Defendant), Appellant, <i>versus</i> Jumeyut Rai and others, (Plaintiffs), Respondents.—Remanded, the decision of the lower Court being indefinite and indistinct, ...	39

CONTENTS FOR FEBRUARY.

	<i>Pages.</i>
Heera Lall, (Plaintiff), Appellant, <i>versus</i> Rutchpal, (Defendant), Respondent. Mortgager not at liberty to alienate by sale the property mortgaged in direct violation of the terms of the contract of mortgage, ..	39
Gomanee Lall, (Plaintiff), Appellant, <i>versus</i> Goordial and others, (Defendants), Respondents. Claim, to bring to sale certain property by reversal of a collusive decree. Dismissal of claim by lower Court upheld, as the disputed property not being actually under attachment, its alienation was lawful, the proof of collusion too having failed, ...	40
Mussumat Jeetoo, (Defendant), Appellant, <i>versus</i> Doongur Mull and others, (Plaintiffs), Respondents. Lower Court's decision reversed, as the facts established in a former suit were inconsistent with the facts established in the present case, ...	41
Baboo Rampurshun Singh, (Plaintiff), Appellant, <i>versus</i> Mussumat Deo Koonwur and others, (Defendants), Respondents. Claim, possession of an estate, with <i>wasildt</i> , decreed in favor of plaintiff, as the deed of endowment produced by defendant was held to be spurious, ...	42
Jingree Singh, (Defendant), Appellant, <i>versus</i> The Raja of Benares, (Plaintiff), Respondent. Claim, to enhanced rent, remanded, the plea urged by defendant of being a privileged rent payer not having been determined by lower appellate Court, ...	43
Ram Pershad Singh and others, (Plaintiffs), Appellants, <i>versus</i> The Collector of Goruckpore, (Defendant), Respondent. Claim, <i>malikana</i> , under the terms of Section 8, Regulation VII. of 1822, dating their cause of action from 1838, in which year the Government first derived revenue from the waste tract. Dismissal of claim by lower Court, under rule of limitation, reversed, and case remanded for retrial, ...	44

Gobind Ram and another, (Plaintiffs), Appellants, <i>versus</i> Balmookund and others, (Defendants), Respondents. Claim, possession under deed of sale by collusion of auction purchaser. Dismissal of claim by lower Court, as founded on a collusive deed of sale, upheld, ...	46
Purmesur Dutt Doobé, (Plaintiff), Appellant, <i>versus</i> Rancee Indurbass Kooree and another, (Defendants), Respondents. Claim, on bond: dismissal of suit by lower Court, as not proven, upheld, ...	49
Sheo Gholam Singh, (Plaintiff), Appellant, <i>versus</i> Hajee Emam Buksh, (Defendant), Respondent. Suit, possession by redemption of mortgage. Dismissal of claim by lower Court upheld, ...	51
Amroodh Singh and others, (Defendants), Appellants, <i>versus</i> Salik Rai, (Plaintiff), Respondent. Claim, recovery of a share in a village: the settlement having been made with defendant, and the suit not having been brought to set aside the settlement, the dismissal of claim by the Moonsiff is upheld, ...	53
Noor Ahmud and others, (Appellants), <i>versus</i> Shuruf-oollissa and others, (Respondents). Ruled, that a mortgagee, who is out of possession, must bring his suit within the period ordinarily prescribed by law, in order to establish the validity of the document under which he claims possession, ...	54
Goshain Manpooree, (Plaintiff), Appellant, <i>versus</i> Purbhoo Dass and others, (Defendants), Respondents. Claim, to set aside a deed of sale, and to bring to sale the property in satisfaction of a decree held by the plaintiff. Dismissal of claim upheld, as collusion was not proved, and the property had been sold prior to attachment, ...	55
Ameer Ali and others, (Defendants), Appellants, <i>versus</i> Moulvee Ahmud Ali and another, (Plaintiffs), Respondents. Decision of lower Court upheld, ...	57
Mohumed Hussun and another, (Plaintiffs), Appellants, <i>versus</i> Ahmud-oollah and others, (Defendants,) Respondents. Claim, of portions of certain estates by right of inheritance. Dismissal of suit, as not proven, upheld, ...	58
J. Stonehouse, (Plaintiff), Appellant, <i>versus</i> H. T. Dods-worth, (Defendant) Respondent. Claim, loss sustained in consequence of an alleged failure on the part of defendant to perform the conditions of a contract. Claim dismissed, as founded on an objectionable and fraudulent transaction, ...	61

Goshein Madho Raojee, (Plaintiff), Appellant, <i>versus</i> Betthul Nath and others, (Defendants), Respondents. Remanded, the <i>bywusta</i> being called for from the Hindoo Law Officer in a manner contrary to judicial usage, as questions on points of law only should be laid before the Law Officer, and not matters of fact, which should be found by the Court itself, ...	67
Moulvee Nadir Ali, (Defendant), Appellant, <i>versus</i> Pultoo and Dharee, (Plaintiffs), Respondents. Claim, value of fruit, on plea of being entitled to share in produce as zumeendar, remanded, lower appellate Court not being justified in setting aside the report of the Ameen, deputed by the Moonsiff, to make a local enquiry, without taking measures to test its accuracy, . .	68
Pursotum Pooree, (Plaintiff), Appellant, <i>versus</i> Goshem Hurkishoon Pooree, (Defendant), Respondent. Claim, possession of half a Hindoo temple. Dismissal of claim, as barred by lapse of time, upheld, ...	69
Imdad Hoossein, (Defendant), Appellant, <i>versus</i> Syed Gholam Ali Shah, (Plaintiff), Respondent. Remanded, the lower appellate Court having found the decision of Court of first instance, as barred by lapse of time, untenable, should have returned the case for trial <i>de novo</i>, ...	71
Nitianund, (Defendant), Appellant, <i>versus</i> The Collector of Allygurh, (Plaintiff), Respondent. Claim, to set aside a decree obtained by the defendant for possession of an estate under charge of the Court of Wards. Decree in favor of plaintiffs upheld, ...	72
Hurchurun Lall, (Plaintiff), Appellant, <i>versus</i> Shewchurun Lall and others, (Defendants), Respondents. Lower Court's decision upheld, ...	75
Sheikh Rumzanee, (Defendant), Appellant, <i>versus</i> Soobhanee and another, (Plaintiffs), Respondents. Remanded, lower Courts not having disposed of the plea of undervaluation urged by the defendant, ...	77



CONTENTS FOR MARCH.

	<i>Pages.</i>
Baboo Duljeet Suhai and others, (Plaintiffs), Appellants, <i>versus</i> Hookem Rai and others, (Defendants), Respondents. Law of limitation must be calculated from date of original decree, and not from date of decision of the Appellate Court, ...	79
Nurput Singh and others, (Plaintiffs), Appellants, <i>versus</i> Oodo Singh, (Defendant), Respondent. Claim, share in the profits of a village: nonsuit pronounced by lower Appellate Court, because the plaintiff had failed to make the <i>assamees</i> co-defendants, overruled, as the issue was not whether any balance was due or not from the <i>assamees</i> , but to whom the rent had been paid, to plaintiff or defendant. Remanded for trial <i>de novo</i> , ...	80
Mussumat Busseerun, (Defendant), Appellant, <i>versus</i> Kalé Khan, (Plaintiff), Respondent. Claim, to bring to sale certain rights in execution of decree, the present defendant objecting to the realization of the money by the sale of the land. Remanded, the Appellate Court not having determined a material issue in the case, ...	81
J. O'B. Saunders, (Defendant), Appellant, <i>versus</i> Rao Khoman Singh, (Plaintiff), Respondent. Claim, redemption of mortgage, the debt having been paid from the <i>usufruct</i> . Dismissal of claim by lower Court upheld, ...	82
Sheikh Zeeaoollah, (Defendant), Appellant, <i>versus</i> Sheikh Hingoo, (Plaintiff), Respondent. Claim, to render absolute a conditional sale. The plea of minority at time of alienation not having been disposed of, the case was remanded, that a fresh decision might be passed after disposing of all the pleas advanced by the parties, ...	83
Belass Rai and others, (Defendants), Appellants, <i>versus</i> Khuwance Singh and others, (Plaintiffs), Respondents. Dismissal of claim by lower Court under law	

CONTENTS.

Pages.

of limitation being overruled by the Appellate Authority, case should be remanded to Court of original jurisdiction for trial on merits, ...	83
Buldeo Dass and others, (Plaintiffs), Appellants, <i>versus</i> Hurkissen, (Defendant), Respondent. Irregular to dismiss the <i>entire</i> claim of a plaintiff when one of the defendants may have admitted the justness of the claim, ...	85
Kasim Ali Khan, (Plaintiff), Appellant, <i>versus</i> Ikram Ali Khan, (Defendant), Respondent. Claim, to set aside a sale. Remanded, Collector has no power, in bringing to sale the interest of a sharer, to sever off a tract of land, and to declare that the interest sold does not embrace the sale of any interest in the severed tract. The lower Court dismissed the case ruling the above point in the affirmative, ...	86
Collector of Goorgaon, (Defendant), Appellant, <i>versus</i> Mungnee and others, (Plaintiffs,) Respondents. Remanded, the Appellate Authority having acted irregularly in adjudicating on a point not set forth in the pleadings of the parties, ...	87
Kalka Pandé and others, (Plaintiffs), Appellants, <i>versus</i> Mussumat Rookma and others, (Defendants), Respondents. Decision of lower Court affirmed, ...	89
Baboo Hurree Dass, (Defendant), Appellant, <i>versus</i> Abdoollah and others, (Plaintiffs), Respondents. Claim, to enforce the opening of a road to a mosque. Remanded, lower Courts having omitted to specify in the memorandum at the foot of the decrees the proportion of costs to be paid by the parties under the decree, as directed by paragraph 10, Circular Order dated 12th February 1847, ...	91
Mohumed Hoossein and others, (Defendants), Appellants, <i>versus</i> Hurruck Chund, (Plaintiff), Respondent. Claim, recovery of certain balances of an amount formerly decreed to plaintiff. Nonsuited, the cause of action having arisen in another zillah than the one in which the suit was tried, ...	92
Bikkurmahjeet Singh and others, (Defendants), Appellants, <i>versus</i> Koonjun Rai, (Plaintiff), Respondent. Claim, to obtain possession under deed of sale. Lower Court's decision annulled, and suit dismissed, as the Principal Sudder Ameen could not give the plaintiff a partial decree on the strength of a deed, which that functionary himself considered a forgery, ...	93

CONTENTS FOR APRIL.

	<i>Pages.</i>
Ameer Beg and others, (Plaintiffs), Appellants, <i>versus</i> Beebee Jubbun Jân, <i>alias</i> Mrs. Foy, (Defendant), Respondent. Claim, possession of a mosque. Dismissal of claim by lower Court, as barred by the law of limitation, upheld, ...	95
Sewa Ram, (Defendant), Appellant, <i>versus</i> Mohumed Khan Zeman Khan, (Plaintiff), Respondent. Claim, damage for defamation of character. Dismissed, as defamatory and libellous expressions, when used by a party in the course of a judicial proceeding, are not actionable, though punishable by the Court in which they are used, ...	97
Mussumat Kurrum Beebee, (Plaintiff), Appellant, <i>versus</i> Huleem Khan and others, (Defendants), Respondents. Remanded, it being held that an officer of the grade of Sudder Ameen is competent under the law to receive a supplemental plaint, ...	100
Dowlut Ram and another, (Plaintiffs), Appellants, <i>versus</i> Chowdhree Hubeeb-collah, (Defendant), Respondent. Claim on bond. Decision of lower Court modified, as it cannot enquire into the nature of the several items which compose a sum covered by a bond, ...	101
Ram Sewuk, <i>tewarree</i> , (Defendant), Appellant, <i>versus</i> Roopa Rai and others, (Plaintiffs), Respondents. Remanded, the Judge's decision being imperfect, inasmuch as a material objection urged by the defendant had been omitted to be noticed, ...	103
Hur Suhai and another, (Plaintiffs), Appellants, <i>versus</i> Moozuffer Hoossein Khan and others, (Defendants), Respondents. Claim, to recover possession of certain beegahs of land. Amended, and decree for costs given against the respondents in common with the other defendants, ...	104
Mussumat Dulzeera and another, (Plaintiffs), Appellants, <i>versus</i> Munsaram, (Defendant), Respondent. Decision of the lower Court upheld, ...	105
Sahebzadeh Muhpal Singh and others, (Defendants), Appellants, <i>versus</i> Nundey, <i>tewarree</i> , and his heirs (Plaintiffs), Respondents. Decision of the lower Court upheld, no ground for interference being found, ...	106

	<i>Pages.</i>
Sheochurn Lall, (Plaintiff), Appellant, <i>versus</i> Mussumat Rookmun Bhao, (Defendant), Respondent. Lower Court's decision upheld, the point on which the special appeal was granted not being applicable, . . .	108
Dhowkul Singh, (Plaintiff), Appellant, <i>versus</i> Murdan Singh, (Defendant), Respondent. Dismissal of claim by lower Court reversed, as the partition sued for could not be refused, and the Judge was not competent to set aside the Settlement proceedings, which the plaintiff pleaded in support of his claim, . . .	110
Mussumat Luchmin, (Defendant), Appellant, <i>versus</i> Jagesur Singh, (Plaintiff), Respondent. Lower Court's decision modified, and costs charged to the plaintiff according to agreement entered into by the parties, . . .	111
Phenkoo Singh and others, (Defendants), Appellants, <i>versus</i> Mundul Singh and others, (Plaintiffs), Respondents. Decision upheld, . . .	112
Mydan Singh, (Defendant), Appellant, <i>versus</i> Rancee Sheo Kuor and another, (Plaintiffs), Respondents. Remanded, as it did not appear from the Judge's decision that he had satisfied himself that the <i>jumma-bundee</i> was a <i>bond fide</i> document, in other words, a record of rents <i>avowed</i> by the parties and <i>ascertained</i> by the Settlement Officer, . . .	114
Tej Singh, (Defendant), Appellant, <i>versus</i> Soondur Lall and others, (Plaintiffs), Respondents. Claim, possession of a share in an estate. Remanded, no finding on the merits of the claim having as yet been had so far as regards the Court of first instance, . . .	115
Oogur Rai and others, (Defendants), Appellants, <i>versus</i> Lippun Rai and another, (Plaintiffs), Respondents. Claim, share of an estate by descent. Remanded, in order that it may be specified in the decree what it is that has been awarded, and from whom it is to be taken, . . .	117
Deen Singh and another, (Defendants), Appellants, <i>versus</i> Rancee Sheo Kuor, (Plaintiff), Respondent. Remanded to the Court of first instance, in order that the rent may be determined with reference to the capabilities of the soil, and in accordance with the spirit of Sections 5, 6 and 7, Regulation V. of 1812, . . .	119
Khoda Buksh Khan and others, (Plaintiffs), Appellants, <i>versus</i> Akbar Ali and others, (Defendants), Respondents. Claim, to cancel two auction sales. Dismissal of claim by lower Court reversed, and appeal decreed, . . .	121

	<i>Pages.</i>
Tulloo Misser, (Defendant), Appellant, <i>versus</i> Sheo Kuor and another, (Defendants), Respondents. Claim, rent. Decree in favor of plaintiffs reversed, and claim dismissed, as the rent being determined at the Settlement, after investigation, until a regular suit is brought for enhancement, the amount cannot be questioned, ..	123
Gyanee, (Defendant), Appellant, <i>versus</i> Taj Mohumed, (Plaintiff), Respondent. Decree of the lower Court modified as against the appellant, he being wrongly impleaded in this action, ...	124
Gowree Pershad, (Plaintiff), Appellant, <i>versus</i> Ramdial Pandé and others, (Defendants), Respondents. Claim, establishment of right to certain lands, which it is alleged was collusively included at the Settlement in the area of another village. Remanded, ..	ib.
Syed Mohsin Ali and others, (Defendants), Appellants, <i>versus</i> Mirza Mohumed Hoosseini, (Plaintiff), Respondent. Claim, a share by descent. Suit dismissed, the plaintiff being consenting to the disposal of the property, and having attested the will with his signature, ...	127
Mullick Dhoomee, (Plaintiff), Appellant, <i>versus</i> Bustee and another, (Defendants), Respondents. Remanded, the Appellate Court having dismissed the suit, as regarded a non-appealing defendant, ...	130
Board of Revenue, (Defendant), Appellant, <i>versus</i> Mr. H. H. Bell, (Plaintiff), Respondent. Review was granted, as the English documents filed in the case were not accompanied by a vernacular translation, by which the respondent had no opportunity afforded him of urging objections against them. The former decision of the Court was, however, on reconsideration, upheld, ..	131
Syed Safdur Ali, (Plaintiff), Appellant, <i>versus</i> Syed Aboul Qasim and others, (Defendants), Respondents. Dismissal of claim by lower Court reversed, the decision being founded on a precedent which had, subsequently, been superseded on review of judgment, which declares that any putteedars in the occupancy of a specific quantity of land in a pure <i>putteedaree</i> village may require the Collector "to allot the separate assessment of such share,"	137
Dhoo-pun Rai and others, (Defendants), Appellants, <i>versus</i> Syed Qasim Ali, (Plaintiff), Respondent. Modified as respects the amount of damages awarded, ..	140

	<i>Pages.</i>
Sheo Dass, (Defendant), Appellant, <i>versus</i> Mussumat Longee, (Plaintiff), Respondent. Claim, to obtain division of a share of a village, nonsuited, it being admitted by plaintiff that a division of the cultivated lands had already been regularly affected by the Revenue Authorities, she was, therefore, not at liberty to bring a suit to effect a <i>new</i> division, but if dispossessed, she was at liberty to sue for the recovery of the same, . .	145



CONTENTS FOR MAY.

	Page.
Bhowannee Bissashur Pershad Singh, (Plaintiff), Appellant, <i>versus</i> Sooful Singh and others, (Defendants), Respondents. Claim, possession of certain estates. Decree in favor of plaintiff upheld, ...	147
Mohun Lall and another, (Plaintiffs), Appellants, <i>versus</i> Mussumat Gheesma and others, (Defendants), Respondents. Claim, to establish a reversionary title to a portion of certain landed estates. Dismissal of suit by lower Court under rule of limitation, upheld, . .	149
Ishree Rai and others, (Plaintiffs), Appellants, <i>versus</i> Surnam Rai and others, (Defendants), Respondents. Lower Appellate Court's decision reversed, as a decree of the Court of first instance could not be set aside without a full statement and consideration of all the reasons upon which it is grounded, . .	151
Nujeeb Khan, (Defendant), Appellant, <i>versus</i> Mujjoo Khan, (Plaintiff), Respondent. Remanded, no opinion having been recorded by lower Appellate Court relative to the alleged collusive nature of the transfer, the fact of such collusion having been found by the Court of first instance, ...	153
Saadut Ali and others, (Plaintiffs), Appellants, <i>versus</i> Har Gopal and others, (Defendants), Respondents. Claim, partition of a <i>surai</i> . Rejection of claim by lower Court upheld, ...	155
Pudarut Dass and others, (Defendants), Appellants, <i>versus</i> Futteh Ali and others, (Plaintiffs), Respondents. Dismissal under the rule of limitation, as the time occupied in the Miscellaneous Department could not be counted against the twelve years within which an action must be instituted upheld, ...	158
Mr. John Nichterlein, (Plaintiff), Appellant, <i>versus</i> Sookh Ram and others, (Defendants), Respondents. Remanded, the Courts having tried a wrong issue, and ruling that Construction No. 1299 does not prohibit the institution of a suit to set aside a fraudulent alienation so long as a party cast under a decree has other property not alienated, but simply points out the remedy open to a suitor when it may so happen that a defendant, with a view to evade the execution	

	<i>Page.</i>
of any decree that may be eventually passed against him, transfers away his whole property by confession of judgment on a fictitious claim upon him, . . .	159
Sawul Singh, (Defendant), Appellant, <i>versus</i> Muhunt Pursram Gir, (Plaintiff), Respondent. Claim, on mortgage bond, to bring to sale certain property pledged therein, and sold under the authority of the Registrar of the Supreme Court, in his capacity of Administrator to the Estate of a deceased British Subject dying intestate, dismissed, as the suit brought against the defendant, the auction purchaser of the property, was irregular, that individual not being in a position to dispute the plaintiff's claim, and ruling that the present case is analogous to that of an adjudication of insolvency in the Calcutta Insolvent Court, the effect of which is, that a mere decree made before the adjudication of insolvency will not authorize the complainant to seize the property of the insolvent, but that he must prove his debt in common with other creditors, ...	161
Bhyroo Doobé and others, (Defendants), Appellants, <i>versus</i> Juggut Buhadur Lall, (Plaintiffs), Respondents, (and another counter appeal). Remanded, on account of manifest inconsistencies between the decrees, the two cases being inextricably blended together, . . .	165
Rajah Juggut Singh, (Plaintiff), Appellant, <i>versus</i> Ishree, (Defendant), Respondent. Claim, enhancement of rent, remanded, the lower Appellate Court having reversed the decision of the Court of first instance without controverting the grounds therein advanced, . . .	167
Boodheea, (Plaintiff), Appellant, <i>versus</i> Bhowannee Pershad and others, (Defendants), Respondents. Lower Court's decision upheld, as if the Collector was competent to grant a farming lease, he was also competent to remit such portion of the rent as appeared to him to be called for, ...	168
Prag Singh and others, (Defendants), Appellants, <i>versus</i> Nonidh Singh and others, (Plaintiffs), Respondents. Claim, possession as <i>birtceahs</i> , nonsuited, as the <i>birt sunnuds</i> upon which the plaintiffs base their claim to the shares in the respective villages are quite distinct documents, quite unconnected with each other, ...	169
Baboo Jyenath Singh and others, (Plaintiffs), Appellants, <i>versus</i> Ramjecawun Singh, (Defendant), Respondent.	

Appeal rejected, as it was absolutely necessary for the ends of justice that the parties, whose interests were liable to be injuriously affected by the result of an appeal, should have been made respondent in the Appellate Court, ...	171
Sheoumber Rai, (Defendant), Appellant, <i>versus</i> Budloo and others, (Plaintiffs), Respondents. Claim, possession by annulment of a deed of sale, nonsuited, on account of the inconsistency in the statements contained in the petition of plaint, ...	172
Sudasookh, (Plaintiff), Appellant, <i>versus</i> Ram Dial and another, (Defendants), Respondents. Decision of lower Court reversed, and decree passed against confessing defendant, ...	174
Jahan Khan, (Defendant), Appellant, <i>versus</i> Khajeh Ali Khan and another, (Plaintiffs), Respondents. Claim, possession by redemption of mortgage,—dismissed, as a Civil Court cannot legally set aside a farming settlement, ...	176
Buttun and Lalla, (Plaintiffs), Appellants, <i>versus</i> Luchmun, <i>tewarree</i> , (Defendant), Respondent. Interest rejected in lower Court awarded in special appeal, as according to established custom, debts on cash accounts are as well as bonds recoverable with interest, ...	178
Anund Lall, (Defendant), Appellant, <i>versus</i> Madho Lall and another, (Plaintiffs), Respondents. Decision on the merits upheld, but a slight modification made as respects costs on the proportion of the claim which has been dismissed, ...	179
Ajoodheea Pershad, (Defendant), Appellant, <i>versus</i> Jeewun Buksh, (Plaintiff), Respondent. Remanded, the Judge's decision being incomplete, inasmuch as he has omitted to record any opinion on a material point urged by the plaintiff as the cause of action, but which had been declared not proved by the Court of first instance, ...	183
Mr. S. R. Greenway and others, (Plaintiffs), Appellants, <i>versus</i> Runmust Khan and others, (Defendants), Respondents. Lower Court's decision modified in conformity with the <i>soolehnamah</i> filed in appeal, ...	185
Koonwur Ajeet Singh and another, (Defendants), Appellants, <i>versus</i> Mirza Ahmed Beg, (Plaintiff), Respondent. Claim, balance due on a deed of <i>kutkinnah</i> ,	

	<i>Page.</i>
dismissed, as the plaintiff had not himself made good any portion of the amount of the <i>theeka</i> , and had therefore no right to institute the suit, ...	186
Syed Wazeer Ali, (Plaintiff), Appellant, <i>versus</i> Himunchul and others, (Defendants), Respondents. In amendment of the lower Court's decision the whole claim has been decreed, ...	189
Hajee Imam Buksh, (Plaintiff), Appellant, <i>versus</i> Sheo Gholam and another, (Defendants), Respondents. Remanded, the suit having been improperly dismissed under Regulation II. of 1803, and ruling that a fine can only be imposed in the form of damages, ...	190
Lall Pertab Buhadur Pal, (Defendant), Appellant, <i>versus</i> Rajah Lall Murdun Pal, (Plaintiff), Respondent. Claim dismissed as not proven, ...	192



CONTENTS FOR JUNE.

	Page.
Sheochurn and others, (Defendants), Appellants, <i>versus</i> Puhlwan Singh and others, (Plaintiffs), Respondents. Claim, for possession of land. Decision of lower Court reversed, case not coming under the provisions of Regulation II. of 1805, ...	197
Gunesh Rai and another, (Plaintiffs), Appellants, <i>versus</i> Girdharee Lall and others, (Defendants), Respondents. Lower Court's decision annulled, as the penalty, for institution of a suit in a zillah, other than that in which it is cognizable, is nonsuit not dismissal, . .	202
Ram Buksh, (Plaintiff), Appellant, <i>versus</i> Gunga Pershad, (Defendant), Respondent. Lower Court's decision reversed, as award of arbitrators cannot be set aside on the mere protestation of the losing party against that award, ...	203
Rajah Oodenarain Mull, (Plaintiff), Appellant, <i>versus</i> Jankee Nath, <i>tewarree</i> , (Defendant), Respondent. A guardian, who had not been made a defendant in the Court of first instance, can become an intervener in the Appellate Court to protect the interests of his Ward, ...	205
Ditto ditto ditto, ...	206
Sheooduhun Singh and another, (in <i>formâ pauperis</i>), (Plaintiffs), Appellants, <i>versus</i> Sheo Pershad and others, (Defendants), Respondents. Sale of property must be considered as revoked, when the decree, in execution of which that property was sold, is reversed in appeal, ...	<i>ib.</i>
Syed Inayut Hoossein, (Plaintiff), Appellant, <i>versus</i> Musumat Hingun Beebee, (Defendant), Respondent. Case remanded to lower Court, as the order of nonsuit was passed on insufficient grounds, ...	209
Sheikh Amudee and another, (Plaintiffs), Appellants, <i>versus</i> Chahut-oonnissa and others, (Defendants), Respondents. A party, succeeding under a title derived from a public sale, is the legal representative of the mortgager, and upon such party the mortgager is bound to issue usual notice of foreclosure, ...	210
Pershadde Lall, (Defendant), Appellant, <i>versus</i> Musumat Bhamia, (Plaintiff), Respondent. Decision of lower	

Court, in decreeing against the parties who confessed judgment, reversed, as the confessing defendants were not in possession of any portion of the right claimed, ...	211
Bukhtawur and another, (Defendants), Appellants, <i>versus</i> Ruttee Ram and others, (Plaintiffs), Respondents. Suit for possession. Decree in favor of plaintiffs upheld, ...	212
Rajah Doorga Pershad, (Defendant), Appellant, <i>versus</i> Koonwur Tikyt Singh and others, (Plaintiffs), Respondents. Sale liable to reversal, when the decree which occasioned the sale is reversed, ...	213
Narain Dass, (Defendant), Appellant, <i>versus</i> Mehrban Ali and others, (Plaintiffs), Respondents. Claim, for right of præemption. Lower Court's decision reversed, ...	214
Buldeo Suhai and another, (Plaintiffs), Appellants, <i>versus</i> Kurum Beebee and another, (Defendants), Respondents. Case remanded. Lower Court's finding being incomplete, ...	215
Juggernath, (Plaintiff), Appellant, <i>versus</i> Mussumat Sahib Khanum, (Defendant), Respondent. Lower Court's decision upheld. Revenue Authorities are not empowered to sell real property in execution of their summary awards other than that on which the arrear has accrued, ...	216
Jyeram, (Defendant), Appellant, <i>versus</i> Kishen Lall, (Plaintiff), Respondent. Case remanded. Lower Court declared incompetent to rectify an omission on renewal of the appeal, ...	217
Oomed Rai, (Plaintiff), Appellant, <i>versus</i> Heera Lall and others, (Defendants), Respondents. Decision of lower Court upheld. Prosecution of claims to ancestral property should be promptly made or they cannot take precedence over those obtaining a decree, in execution of which that property has been sold, ...	218
Amanut Ali and others, (Defendants), Appellants, <i>versus</i> Lootf Ali and others, (Plaintiffs), Respondents. Claim, for proportionate share in a shrine and its offerings. Decision of lower Court upheld, ...	219
Ditto ditto, <i>versus</i> ditto ditto. Lower Court's decision regarding <i>wasildt</i> , reversed, ...	220
Khyratee Ram and others, (Defendants), Appellants, <i>versus</i> Mussumat Seetoo and others, (Plaintiffs), Respondents. Case remanded. Mortgager cannot sue for redemption so long as there is a balance due, ...	221
Ditto ditto, <i>versus</i> ditto ditto, ...	222

Gunesh Rai and another, (Plaintiffs), Appellants, <i>versus</i> Dowlut and others, (Defendants), Respondents. Case remanded. An unsuccessful attempt to appeal in <i>formâ pauperis</i> does not necessarily bar the operation of the law of limitation in regard to appeals, ...	222
Rampul, (Defendant), Appellant, <i>versus</i> Hajee Imam Buksh, (Plaintiff), Respondent. Claim, to substitute name on the Revenue Record. Lower Court's decision upheld, ...	224
Rajah Ishreepershad Narain Singh, (Defendant), Appellant, <i>versus</i> Rai Tek Lall, (Plaintiff), Respondent. Claim, for possession of a talooqah. Lower Court's decision upheld, ...	227
Mussumat Goolab Koonwur, (Plaintiff), Appellant, <i>versus</i> Mohun Lall and another, (Defendants), Respondents. Claim, for principal and interest, dismissed, ...	229
Khemkurun Singh and others, (Defendants), Appellants, <i>versus</i> Moohkum Singh and others, (Plaintiffs), Respondents. Claim, by right of preëmption cannot be divided. Lower Court's decision amended, ...	231
Khemkurun Singh and others, (Plaintiffs), Appellants, <i>versus</i> Toolsee Ram and others, (Defendants), Respondents. Ditto ditto ditto, ...	234
J. W. Birch, (Plaintiff), Appellant, <i>versus</i> H. A. Reid and others, (Defendants), Respondents. Claim, for abolition of the office of guardian and for possession. Lower Court's decision upheld, ...	<i>ib.</i>
Mussumat Butasee and another, (Plaintiffs), Appellants, <i>versus</i> Mussumat Mohumdee Jan and others, (Defendants), Respondents. Claim for possession. Lower Court's decision upheld, ...	237
Jowahir Singh, (Defendant), Appellant, <i>versus</i> Cheetur Mull and another, (Plaintiffs), Respondents. Lower Court's decision upheld in regard to the genuineness of a deed of sale, ...	239
Jowahir Singh, (Plaintiff), Appellant, <i>versus</i> Jogul Kishore and others, (Defendants), Respondents, ...	240
Ditto (Defendant), Appellant, <i>versus</i> Ditto, (Plaintiffs), Respondents, ...	241
Jowahir Singh, (Plaintiff), Appellant, <i>versus</i> Hur Buksh and another, (Defendants), Respondents, ...	<i>ib.</i>
Luchmun and others, (Defendants), Appellants, <i>versus</i> Bhageerut and others, (Plaintiffs), Respondents. Claim to establish a proprietary title. Case remanded. Lower Court's decision being imperfect, ...	242

Nuwab Mohumed Khan, (Defendant), Appellant, <i>versus</i> Nuwab Mohumed Wullee Dad Khan, (Plaintiff), Re- spondent, ...	243
Mohumed Abdoollah Khan, (Defendant), Appellant, <i>versus</i> Nuwab Mohumed Wullee Dad Khan, (Plaintiff), Re- spondent. Claim for possession and <i>wasildt</i> . Lower Court's decision affirmed, ...	<i>ib.</i>
Chutree Singh, (Plaintiff), Appellant, <i>versus</i> Sadhoo Singh and others, (Defendants), Respondents. Suit, for redemption of land. Remanded for a complete judg- ment, ...	245
Sheodeehul Rai and others, (Defendants), Appellants, <i>versus</i> Baboo Jynarain Singh, (Plaintiff), Respondent. Claim, to recover arrear of rent. Lower Court's deci- sion amended, ...	246
Mussumat Rancee, (Plaintiff), Appellant, <i>versus</i> Rancee Bysee and others, (Defendants), Respondents. Case struck off the file, in consequence of the abatement of the appeal by the death of appellant, without heirs, . .	<i>ib.</i>
Moouzzum Khan and others, (Defendants), Appellants, <i>versus</i> Khoondun Singh and others, (Plaintiffs), Re- spondents. Claim, to obtain possession by redemption of a mortgage. Lower Court's decision modified, . .	255

CONTENTS FOR JULY.

	<i>Page.</i>
Teja, (Defendant), Appellant, <i>versus</i> Soomeer Singh and others, (Plaintiffs), Respondents. Remanded, the lower Appellate Court having omitted to adjudicate upon a material point raised by the defendant, as to whether the conditions of the <i>wajib-ool-urz</i> had been conformed to, ...	259
Rujesur Singh and another, (Plaintiffs), Appellants, <i>versus</i> Oodwunt Singh, (Defendant), Respondent. Appeal dismissed, no cause for interference being shewn, . .	260
Ghunseam Dass and others, (Plaintiffs), Appellants, <i>versus</i> Aitma Ram, (Defendant), Respondent. Claim, to be put in possession and to be recorded in place of defendant as mortgagees. Lower Court's decision upheld, plaintiff not being competent to recede from an act advisedly performed, ...	<i>ib.</i>
Heera Singh and others, (Plaintiffs), Appellants, <i>versus</i> Bryan-oolah and others, (Defendants), Respondents. Nonsuit by the lower Court upheld, though the plaintiffs having sued for what the Courts could not give them, an order for dismissal would have been more regular, but ruled, that appellant could not be placed in consequence of their appeal in a worse position than before, the appeal was therefore merely dismissed, ...	262
Koonwur Goordial Singh, (Plaintiff), Appellant, <i>versus</i> Koonwur Roshun Singh, (Defendant), Respondent. Remanded, the ruling of the lower Court, that an award of private arbitration for money could not be made the sole ground of a decree, being reversed, . .	263
Mujjoo Singh, (Plaintiff), Appellant, <i>versus</i> Rajah Sheo Ghoolam Doobé, (Defendant), Respondent. Rent having been fixed by a regular decree of the Civil Court, according to which the claim was made, the reasons assigned by the Judge for giving a decree in favor of the defendant agreeably to the <i>jummabundee</i> , were deemed insufficient, and appeal consequently dismissed; the decision of the Court of first instance being upheld, as being in accordance with the law, . .	264

	<i>Page.</i>
Laljee, (Plaintiff), Appellant, <i>versus</i> Thakoor Motee Singh and others, (Defendants), Respondents. Remanded, the lower Court having failed in the adjudication of a material point, as to whether it was competent in the seller, under the terms of the <i>wajib-ool-urz</i> , to dispose of the property to a stranger, ...	265
Rikhee Ram, (Plaintiff), Appellant, <i>versus</i> Zalim Singh, (Defendant), Respondent. Remanded, the lower Court having failed to determine the pleas advanced, that the deed of sale in the plaintiff's name was fraudulent, and that no money was ever paid on it, ...	266
Ramroop Singh and others, (Plaintiffs), Appellants, <i>versus</i> Ramdehul Singh and others, (Defendants), Respondents. Suit, for proprietary possession of land. Appeal dismissed without respondents being summoned; no reason for interference with the lower Court's decision being apparent, ...	267
Syed Ali and another, (Plaintiffs), Appellants, <i>versus</i> Sooltan Ali and others, (Defendants), Respondents. Claim, for possession, by partition, of a share of an estate. Lower Court's dismissal of suit reversed as not bearing out the facts, and decree passed in favor of plaintiffs, ...	268
Munoo Lal, (Plaintiff), Appellant, <i>versus</i> Nund Kishore and others, (Defendants), Respondents. Claim, for <i>wasilat</i> : dismissal of claim by lower Court overruled, and decree given in favor of plaintiff, the fact of joint possession being established, ...	273
Hurgopal, (Defendant), Appellant, <i>versus</i> Bulbhudder Pershad, (Plaintiff), Respondent. Lower Court's decision reversed as not founded on the facts of the case, ...	276
Nurunjun Singh, (Defendant), Appellant, <i>versus</i> Pershad Singh, (Plaintiff), Respondent. Claim, possession of a garden. Lower Court's decision reversed, and claim dismissed, as when a <i>butwarrah</i> is effected, the produce of the land follows the fate of the land itself, ...	277
Chey lee Lal and others, (Defendants), Appellants, <i>versus</i> Mussumat Choonya and others, (Plaintiffs), Respondents. Claim nonsuited, the notice prescribed by Section 8, Regulation XVII. of 1806 on mortgager not having been issued, ...	278
Ram Buksh, (Defendant), Appellant, <i>versus</i> Khooshal and another, (Plaintiffs), Respondents. Claim, to obtain separation of a portion of an estate. Decision of Court of first instance upheld, ...	280

	Page.
Goman Singh, (Plaintiff), Appellant, <i>versus</i> Punchum Singh and others, (Defendants), Respondents. Remanded, lower Appellate Court having dismissed the claim of the plaintiff without adverting to the documentary evidence filed with the record, ...	282
Zalim Singh and others, (Defendants), Appellants, <i>versus</i> Jankee Singh and others, (Plaintiffs), Respondents. Claim, alteration of the <i>shushmahee</i> papers: dismissed under rule of limitation, ...	284
Atta-oollah, (Defendant), Appellant, <i>versus</i> Gowree Mull and another, (Plaintiffs), Respondents. Lower Appellate Court's decision amended in regard to the appellant, as it was not competent to the Judge to amend the Moonsiff's decree so as to affect the appellant, seeing that no appeal was preferred by the plaintiffs against the order of the Moonsiff exempting Atta-oollah from liability, ...	286
Devec Pershad, (Plaintiff), Appellant, <i>versus</i> Cheita, (Defendant), Respondent. Claim, rent, founded on the <i>jummabundee</i> of Settlement: decree given in favor of plaintiff, as it was not competent for the lower Courts to make a deduction from the plaintiff's claim in opposition to the <i>jummabundee</i> fixed at the Settlement, . .	287
Mohumed Ali and others, (Defendants), Appellants, <i>versus</i> Mussumat Ujaib-oon-nissa, and another case <i>vice versa</i> , (Plaintiff), Respondent. Claim, to recover Rs. 52,000, the amount of dower: dismissed for want of proof, ...	288
Sheikh Bubur Ali, (Defendant), Appellant, <i>versus</i> J. M. Tritton, (Plaintiff), Respondent. Remanded, lower Appellate Court having misinterpreted the judgment of the Court of first instance, ...	290
Kureem Buksh Khan, (Plaintiff), Appellant, <i>versus</i> Tul-keen Shah and another, (Defendants), Respondents. Claim, for recovery of rent. Remanded, the lower Courts having acted illegally in trying this suit without referring the same to the Collector for report, ...	291
Gunga Dass, (Plaintiff), Appellant, <i>versus</i> Awuz Khan, (Defendant), Respondent. Claim, to contest award passed in the Revenue Court. Remanded, the Judge not having disposed of the reasons in the Moonsiff's decree, which his judgment reverses, ...	293
Rajah Chitpal Singh, (Defendant), Appellant, <i>versus</i> Moosuffur Hoossein Khan, (Plaintiff), Respondent. Non-suited, as the award on which the suit was founded	

	<i>Page.</i>
was not a valid one, as it did not embrace the settlement of his claim, ...	302
Chitumburnath Koomar Samee, (Defendant), Appellant, versus Thakoor Hursurn Singh, (Plaintiff), Respondent. Claim, possession of a <i>bārāduree</i> . Lower Court's decision in favor of plaintiff upheld, ...	304
Gheesun and others, (Defendants), Appellants, versus Behadur Singh, (Plaintiff), Respondent. Remanded for rectification of defect arising from misapprehension of the Moonsiff as to the terms of the plaint, . .	308
Girdharee Lall, (Plaintiff), Appellant, versus Jograj, (Defendant), Respondent. Claim, recovery of a certain amount, principal and interest of a sum realized under a decree. Decree given in favor of plaintiff, as he was entitled to his share of the proceeds of sale under decree held by him, ...	309
Surnam Singh and others, (Defendants), Appellants, versus Jesree Singh and others, (Plaintiffs), Respondents. Dismissed, as the claim being one founded on a right of inheritance, should have been included in a former suit instituted by the plaintiffs, ...	313
Sree Gopal and others, (Plaintiffs), Appellants, versus Dabeedial Singh and others, (Defendants), Respondents. Remanded, the party having come into Court under an alleged title deed, and there was nothing to prevent the case being heard, ...	315
Mr. Berrill and others, (Plaintiffs), Appellants, versus Sheo Suhae, (Defendant), Respondent. Claim, damages. Decision of arbitrator, awarding a certain amount as damages, upheld, as the non-receipt by the Judge of the award on the prescribed date does not affect its validity, ...	316

CONTENTS FOR AUGUST.

	<i>Page.</i>
Mussumat Masooma Begum and others, (Plaintiffs), Appellants, <i>versus</i> Dutt Ram, (Defendant), Respondent. Claim, redemption of mortgage. Remanded, the lower Court having dispensed with the course enjoined by Section 10, Regulation XXXIV. of 1803, as to delivery into Court of the accounts, on oath, by mortgagee, ...	819
Munohur Rae and others, (Defendants), Appellants, <i>versus</i> Shah Mukbool Alum and others, (Plaintiffs), Respondents. Claim dismissed, it not having been brought within the period during which it may be legally heard, ...	820
Tiluk Singh and others, (Plaintiffs), Appellants, <i>versus</i> Doorjun Singh and others, (Defendants), Respondents. Claim, damages for illegal distraint. Remanded, the true point at issue, viz. as to whether the plaintiffs were chargeable with the illegal distraint or not, having been overlooked by the Judge, ...	821
Mohumed Hybut-oollah, (Plaintiff), Appellant, <i>versus</i> Durab Khan, (Defendant), Respondent. Claim, rent under a lease. Remanded, the lower Appellate Court having failed to adjudicate the plea of the parties, ...	824
Sahib Zadeh Muhespertab Singh and others, (Plaintiffs), Appellants, <i>versus</i> Ramghureeb Chowbé and another, (Defendants), Respondents. Claim, possession by erasure of the respondents' names from the Settlement record, on the plea that the deed of sale, by Hindoo law, was illegal. Dismissal of suit by lower Court upheld, it being evident that the money was borrowed by the father of the appellants for necessary expences, as specified in the deed, and that the present appellants, being his sons, are mere instruments in his hands, ...	825
Thakoor Bhurt Singh, (Defendant), Appellant, <i>versus</i> Keshoo and others, (Plaintiffs), Respondents. Decision of Court of first instance upheld, the lower Appellate Authority not being competent to define the extent of the interest mortgaged, under the circumstances of this mortgage, ...	328

	<i>Page.</i>
Tej Singh and others, (Defendants,) Appellants, <i>versus</i> Mungul Singh and another, (Plaintiffs), Respondents. Lower Court's decisions modified, being faulty in having decreed an interest in excess of the interest covered by the deed of sale held by the respondents,	329
Sheosubhai and others, (Defendants), Appellants, <i>versus</i> Luchoo Singh, (Plaintiff), Respondent. Dismissed under rule of limitation, suit for possession having been brought twelve years after Settlement, ...	330
Sheo Pershad Singh and others, (Defendants), Appellants, <i>versus</i> Shah Hoossein Buksh and others, (Plaintiffs), Respondents. Claim, recovery of the value of a tree cut down by the defendants. Remanded, the Courts having erred in not adjudicating the pleas of the parties, ...	331
Sed Mull, (Plaintiff), Appellant, <i>versus</i> Mussumat Raj Ranee, (Defendant), Respondent. Claim, on bond. Nonsuit of the lower Court upheld, the Courts being incompetent to decree possession of a pension, . .	332
Reasut Ali, (Plaintiff), Appellant, <i>versus</i> Deendeyal Rai and another, (Defendants), Respondents. Remanded, by reversal of the lower Court's order, the holding being of the nature of a mortgage and not a lease, ...	334
Doolaree Lall, (Plaintiff), Appellant, <i>versus</i> Zalim Singh, (Defendant), Respondent. Modified, the interest on the claim disallowed by the lower Court being granted, a Civil Court not being competent to strike off interest on the ground of delay in suing for a debt,	335
Munsaram and others, (Plaintiffs), Appellants, <i>versus</i> Chundun Lall, (Defendant), Respondent. Claim, reversal of a sale held in execution of a decree. Appeal dismissed, proper measures not having been taken by the judgment debtor to satisfy the decree in time, . .	336
Sheoraj Singh, (Defendant), Appellant, <i>versus</i> Munsookh Rai, (Plaintiff), Respondent, (and another case <i>vice versa</i>). Dismissed under law of limitation, it having been repeatedly ruled that the presenting of a miscellaneous petition will not save limitation, and the plaintiff not having moved in any regular suit for possession within twelve years from date of the order for foreclosure, ...	337
Kunhya Lall, (Plaintiff), Appellant, <i>versus</i> Kasim Ali, (Defendant), Respondent. Modified as respects the interest on the claim disallowed by the Court, and as regards cost, which is charged to defendant,	338

	<i>Page.</i>
Hursurn Singh, (Plaintiff), Appellant, <i>versus</i> Juggoo Singh and others, (Defendants), Respondents. Claim, recovery of a balance on a lease. Decreed in favor of plaintiff by reversal of lower Court's decree, with interest, on claim, at 5 per cent., no rate of interest having been specified in the deed, ...	339
Golab Rai, (Plaintiff), Appellant, <i>versus</i> Buldee and others, (Defendants), Respondents. Claim, on bond. Remanded, lower Appellate Court having reversed the decision of Court of first instance without controverting the grounds on which that decision was founded,	342
Sheoumbur Rai and others, (Plaintiffs), Appellants, <i>versus</i> Mussumat Rookmin Kuor and others, (Defendants), Respondents. Remanded, the chief point at issue between the parties not having been disposed of, . .	343

CONTENTS FOR SEPTEMBER.

	<i>Page.</i>
Mussumat Ranee Bhughelun, (Defendant), Appellant, <i>versus</i> Bukhtmuil and another, (Plaintiffs), Respondents. Claim, recovery of the amount of three instalments according to a confession of judgment, and to establish the existence of two instalments still due thereon. Decree of lower Court in favor of plaintiff, for instalments due, upheld in appeal by the superior Court, ...	345.
Mussumat Manoo and others, (Defendants), Appellants, <i>versus</i> Thanoo and others, (Plaintiffs), Respondents. Claim, partition of a moiety of the lands of a village with <i>wasildt</i> . Nonsuited, the petition of plaint being so ambiguously worded as not to denote clearly the object of the suit, ...	348
Nuwab Mohumed Houssein Ali Khan and another, (Plaintiffs), Appellants, <i>versus</i> Zumaniya Begum and others, mortgagees and auction purchasers, (Defendants), Respondents; and another suit connected with it in which the plaintiff is auction purchaser of one of the villages comprised in the <i>altunga</i> grant. Decree of lower Court upheld, with exception as to amount of dower stated by the Principal Sudder Ameen to have been settled on the defendant, and ruling that <i>sunuds</i> containing the words <i>altunga nuslus bad nuslus</i> , &c., are hereditary tenures, and transferrable by gift, sale or otherwise, ...	350
Bhan Purgass Narain Singh and others, (Plaintiffs), Appellants, <i>versus</i> Rampergass Singh and others, (Defendants), Respondents. Claim, possession of one-sixth of a talooqua: dismissal of suit by lower Court, under rule of limitation, upheld, with observations in regard to the case, as to its not being entertainable by a Civil Court, the cause having been heard and determined previously, ...	359
Munneeram, <i>tewarree</i> , (Defendant), Appellant, <i>versus</i> Sobha Singh, (Plaintiff), Respondent. Ruling of the lower Court, making each party pay his own costs, upheld by the superior Court, under the circumstances stated, ...	365

	<i>Page.</i>
Koshalie and others, (Plaintiffs), Appellant, <i>versus</i> Mussumat Sibnee and others, (Defendants), Respondents. Decision of lower Court in favor of defendants upheld, it being declared by the <i>byewusta</i> of the Hindoo Law Officer that ancestral property, held separately by the husband, and so descending to his childless widow, is alienable by the widow, ...	366
Baboo Luchmun Singh and others, (Plaintiffs), Appellants, <i>versus</i> Ikram Ali Khan, (Defendant), Respondent. Remanded, the order of nonsuit being reversed, it having been ruled, on a previous occasion, that a suit brought to establish a right under an award of arbitrators appointed in conformity to Regulation IX. of 1838, must be tried on its merits, ...	367
Sheikh Ameer Ali and others, (Plaintiffs), Appellants, <i>versus</i> Bisan Beebee and others, (Defendants), Respondents. Remanded, the claim embracing no question of Mahomedan Law, the Judge was not called on to rest his decision upon the opinion of the Law Officer, ...	368
Sahoo Deokeenundun, (Plaintiff), Appellant, <i>versus</i> Syed Moouzzum Ali and others, (Defendants), Respondents. Remanded, the ruling of the lower Court that the demand of interest under the provisions Act XXXII. of 1839 was not tenable, being reversed, the point being determined in favor of appellant, ...	370
Mohumed Zuhoor Ali Khan and another, (Plaintiffs), Appellants, <i>versus</i> Tara Singh and others, (Defendants), Respondents. Remanded, plaintiffs obtaining a decree in the Court of first instance, a Court of appeal is bound to confine its attention to the matter brought before it by such plaintiff in appeal, and either to maintain that decree in its integrity, or to make the amendment prayed for, but is not justified in placing them in a more disadvantageous position than they would have been, had they not appealed, ...	371
John Lambourn, (Defendant), Appellant, <i>versus</i> Kunhya Lall and others, (Plaintiffs), Respondents. Remanded, the Moonsiff being incompetent to receive an unstamped promissory note, ...	372
Mohun and others, (Defendants), Appellants, <i>versus</i> Lontun and others, (Plaintiffs), Respondents. Nonsuited, the decree of the lower Courts for division of the interests represented by fractions of a beegah in a <i>bhyachara</i> mouzah being declared inconsistent with law and precedent, ...	373

	<i>Page.</i>
Collector of Banda, (Defendant), Appellant, <i>versus</i> Mussumat Choona, (Plaintiff), Respondent. Remanded, the lower Appellate Court having waived any decision on the merits of the subject of the appeal, ...	374
Mussumat Brija, (Plaintiff), Appellant, <i>versus</i> Jewun Suhai and others, (Defendants), Respondents. Remanded, the ruling that the transfer, made to the plaintiff in 1848, was illegal by the attachment of the property in 1844, after that attachment had been taken off, the sale formally stayed, and the case struck off the file, being reversed, ...	375
Bickrum Singh and others, (Defendants), Appellants, <i>versus</i> Jowahir Singh, (Plaintiff), Respondent. Remanded, because the Principal Sudder Ameen was in error in supposing that the decree of the Court of first instance must necessarily be upheld because the Sudder Dewanny Adawlut reversed his (the Principal Sudder Ameen's) decision, and remanded the suit, ...	376
Muttra Pandé and others, (Defendants), Appellants, <i>versus</i> Chyt Pandé, (Plaintiff), Respondent. Claim, to establish right and title to a <i>maaffee</i> village by reversal of certain orders of the revenue authorities for <i>wasildt</i> . Decision of lower Court in favor of plaintiff affirmed in appeal, ...	378
Kishun Dutt, (Defendant), Appellant, <i>versus</i> Ramjeeawun, (Plaintiff), Respondent. Remanded, the Judge's decision being at variance with the plaintiff's own statement of the facts of the case, and contradictory in itself, and opposed to the rule, which prescribes that Judges shall confine themselves to the adjudication of the point or points at issue between the parties as set forth by themselves, ...	379
Deendyal Singh and others, (Defendants), Appellants, <i>versus</i> Muhesh Dutt and others, (Plaintiffs), Respondents. Claim, to obtain possession of certain lands; to have the names of plaintiffs entered in the survey papers, as proprietors, and to amend the Settlement proceedings. Remanded to Court of first instance, as its decree and that of appellate authority is vitiated by the insertion of a condition, which opposes an obstacle to its execution, ...	380
Futteh Singh, (Plaintiff), Appellant, <i>versus</i> Suddasookh and others, (Defendants), Respondents. Remanded, the Judge not having adjudicated the pleas of the parties, ...	382

	<i>Page.</i>
Teekaram, (Plaintiff), Appellant, <i>versus</i> Choonnee Lall, (Defendant), Respondent. Claim, for recovery of a balance of account in some money transactions between two firms. Remanded, the reasons assigned by the Judge for dismissal of the suit being incorrect, ...	283.
Ghyber Singh and others, (Plaintiffs), Appellants, <i>versus</i> Bhojraj and others, (Defendants), Respondents. Claim, to be put in possession of a certain share of an estate, by ejecting certain of the defendants, descendants of one Mân Singh, who was placed in possession of the estate in succession to certain parties, who had obtained possession by an order passed by the Judge; and for recovery of surplus proceeds. Decree given in favor of plaintiff, by reversal of lower Court's decision, as the rules which bear on mortgage cases cannot be made to extend to the case of property made over to a creditor for the more effectual recovery of a debt, ...	385
Buldeo Sahoy, (Plaintiff), Appellant, <i>versus</i> Mussumat Kurreemun and others, (Defendants), Respondents. Remanded, the Judge being bound to confine his decision to the points at issue between the parties,	391
Bindrabun, (Defendant), Appellant, <i>versus</i> Moorleedhur and others, (Plaintiffs), Respondents. Appeal dismissed: deeds may in some cases be avoided by objections relating to the consideration on which they are founded, or to the want of consideration, but generally speaking the delivery of the deed evidences the completeness of the transactions, ...	392
Nunnoo, (Plaintiff), Appellant, <i>versus</i> Futteh Singh, (Defendant), Respondent. Appeal decreed, in annulment of the lower Court's order of nonsuit, the Principal Sudder Ameen having passed his decision contrary to judicial usage, ...	393.



CONTENTS FOR NOVEMBER.

	<i>Page.</i>
Baboo Hurlpershad Singh, (Plaintiff), Appellant, <i>versus</i> Premsookh and others, (Defendants), Respondents. Claim, recovery of amount of decree, costs, &c., by sale of an estate, collusively transferred, which having been proved, the suit was decreed in favor of plaintiff in reversal of lower Court's decision, ...	395
Luchmun Dass, (Defendant), Appellant, <i>versus</i> Rugbuns Suhai and others, (Plaintiffs), Respondents. Remanded, the lower Courts having determined the illegality of an auction sale without first recording any opinion regarding the validity of the deed by which the title was derived, ...	398
Omeid and others, (Plaintiffs), Appellants, <i>versus</i> Thakoorpershad and others, (Defendants), Respondents. The date of the filing of a supplemental plaint is no data, by which a suit can be brought under the operation of the limitation law, ...	400
Doongur Singh, (Plaintiff), Appellant, <i>versus</i> Goolab and others, (Defendants), Respondents. Remanded, by reversal of lower Court's order, dismissing the claim, as falling under statutory bar, the plaintiff being entitled to a decision on the merits in respect to the instalments of a bond claimable within twelve years from the date of suit, ...	401
Claude Hamilton Brown, Attorney of Administrator General, (Defendant), Appellant, <i>versus</i> Bynee Lall and another, (Plaintiffs), Respondents. Claim, possession of a talooqua by removal of attachment under which it is held. Claim dismissed, the proof being, <i>in toto</i> , insufficient to warrant a decree in plaintiff's favor, ...	402
Goolab Rai and others, (Defendants), Appellants, <i>versus</i> Nadira Beebee and others, (Plaintiffs), Respondents. Claim, possession of a certain quantity of land. Dismissed under statutory bar, ...	408
Girund Singh, (Defendant), Appellant, <i>versus</i> Ghunsam Singh, (Plaintiff), Respondent. Claim, possession, by division, of a share of an estate. Suit dismissed, Civil Courts having no jurisdiction in claims for the alteration of the Settlement arrangements, ...	410

CONTENTS FOR DECEMBER.

	<i>Page.</i>
Nurain and another, (Defendants), Appellants, <i>versus</i> Mussumat Sona and another, (Plaintiffs), Respondents. Claim, on an account. Remanded, the lower Appellate Court having reversed the decision of the subordinate Court without disposing of the reasons on which that judgment was grounded, ...	413
Radhey, <i>tewarree</i> , (Defendant), Appellant, <i>versus</i> Baboo Bhurtpershad and others, (Plaintiffs), Respondents. Claim nonsuited, the plaintiffs being incompetent to sue for possession of hereditary property during the life-time of their fathers, who are made defendants in the case, ...	414
Rajah Eshuree Pershad Narain Singh, (Defendant), Appellant, <i>versus</i> Chunder Seehur Bais, (Plaintiff), Respondent. Remanded, the enquiry made by the lower Courts being so meagre that the Court is unable to determine the question of usage on a review of the papers before them, ...	415
Dhunna Singh and others, (Defendants), Appellants, <i>versus</i> Buldeo Singh and another, (Plaintiffs), Respondents. Claim, on an award of arbitration. Suit dismissed, as the arbitrators had no jurisdiction in matters which have not been specifically referred to them, ...	417
Wuzeer Ali and others, (Defendants), Appellants, <i>versus</i> Sher Ali, (Plaintiff), Respondent. (And another case <i>vice versa</i> .) Claim, possession of an half-anna share in an estate. Remanded, the existence of the right claimed being founded on inference and assumption than on proof, ...	418
Phenkoo Singh and others, (Defendants), Appellants, <i>versus</i> Mundul Singh and others, (Plaintiffs), Respondents. Claim, recovery of possession of certain lands, and amendment of the six-monthly papers, so as to bring them into accordance with actual holdings. Appeal dismissed on review of judgment, as the Court is bound in special appeal to take the facts as found in the decisions of the lower Court, ...	420

	<i>Page.</i>
Mohumed Khuleel, (Plaintiff), Appellant, <i>versus</i> Jumna Dass and others, (Defendants), Respondents. Dismissal of claim by lower Court upheld, ...	421
Oodhoo Dass, (Plaintiff), Appellant, <i>versus</i> Salikram and others, (Defendants), Respondents. Claim, to bring to sale a share of an estate in satisfaction of a decree by establishment of right and title thereto of defendant, appellant, against whom the decree was originally obtained. Dismissal of claim by lower Court, on ground that the property being an endowment was not saleable, reversed, as in buying a portion of their rights, from the zemindars, the corporate body of <i>fageers</i> constituted for themselves a property independent of the endowment, upon which the laws in force for the satisfaction of decrees may strictly be brought to bear, ...	423
Mobaruk Begum, (Plaintiff), Appellant, <i>versus</i> Zynoolabideen, (Defendant), Respondent. Remanded, on review of judgment, as the Judge was in error in rejecting the suit, on grounds foreign to the issue between the parties, ...	427
Mobaruk Begum, (Plaintiff), Appellant, <i>versus</i> Yoosuf Ali Khan and another, (Defendants), Respondents. Appeal dismissed in confirmation of the lower Court's order, dismissing the suit, as the appellant followed a wrong course in instituting the suit in face of a preceding decree, which disallowed her title. The remedy laid in the review of judgment, ...	429
Wilayet Ali Shah, (Defendant), Appellant, <i>versus</i> Jowahir Singh, (Plaintiff), Respondent. Lower Court's order decreeing the case upheld, ...	430
Boodha Singh and others, (Defendants), Appellants, <i>versus</i> Goolzar Singh, (Plaintiff), Respondent. Remanded, the decisions of the lower Courts being incomplete, as they have omitted to notice and adjudicate on a material plea urged by one of the defendants, . .	431
Mirza Abdool Moomun and others, (Defendants), Appellants, <i>versus</i> The Agent, in behalf of the King of Dehlie, (Plaintiff), Respondent. Claim, possession of 380 yards of ground with a well. Decree in favor of plaintiff affirmed, ...	432
Bundoo Singh and others, (Defendants), Appellants, <i>versus</i> Baboo Gungabishen Singh, (Plaintiff), Respondent. Claim, possession of certain beegahs of arable land. Lower Court's decision in favor of plaintiff affirmed, ...	434

Mirza Azeez-ood-deen and others, (Plaintiffs), Appellants, <i>versus</i> Mohumed Buksh and others, (Defendants), Respondents. Lower Court's decision amended, by removal of the restriction with which it was fettered,	Page. 436
Joseph Skinner, (Defendant), Appellant, <i>versus</i> L. P. Lyons, Agent for the Manager of the affairs of D. O. Sombre, a lunatic, (Plaintiff), Respondent. Decree, awarded by the lower Court in favor of plaintiff, affirmed, ..	437
Hoolas Rae and another, (Plaintiffs), Appellants, <i>versus</i> Futtehchund and others, (Defendants), Respondents. Remanded, the lower Appellate Court not being competent to dismiss a claim <i>in toto</i> , in appeal from an order of nonsuit, ...	439
Khajeh Buksh Khan, (Plaintiff), Appellant, <i>versus</i> Kadir Buksh Khan and others, (Defendants), Respondents. Claim, to recover possession of certain <i>maaffee</i> lands &c., with <i>wasilat</i> : dismissal of claim upheld, with the exception to the order awarding fees to five of the defendants' pleaders, the answers in all being identical, which is accordingly amended, and fees granted to one pleader, and conveying strictures on the practice,	<i>ib.</i>
Hajee Imam Buksh and others, (Plaintiffs), Appellants, <i>versus</i> Ramsuhae Misser and others, (Defendants), Respondents. Remanded, in order that the dispute between zemindar and cultivator, regarding land rates, as invested in the Court by law, might be adjusted,	443
Ghoolam Jeelancee and others, (Plaintiffs), Appellants, <i>versus</i> Mudone, (Defendant), Respondent. Claim, <i>purjote</i> dues. Remanded, lower Court not being warranted in rejecting the claim of appellants, on the ground that the name of the <i>individual</i> defendant was not inserted in the Settlement record, the proceedings at Settlement having recognized generally the right contended by them, ...	445
Sheodyal Singh and others, (Defendants), Appellants, <i>versus</i> Sheikh Wajid Ali and others; (Plaintiffs), Respondents. Claim, recovery of value of fish. Remanded, the lower Court having omitted to pronounce on the genuineness or otherwise of the document on which the defendants rested their opposition to the claim, ..	446

DECISIONS
OF THE
SUDDER DEWANNY ADAWLUT,
N. W. P.

RECORDED IN ENGLISH, IN CONFORMITY TO ACT XII. 1843.

The 4th January, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 70 OF 1850. { *Regular appeal from the decision of
Moulvee Mohumed Abdool Azeez Khan,
Principal Sudder Ameen of Goruck-
pore, dated 25th March 1850.*

PURGASH RAI, (*Plaintiff*), *Appellant*,
versus

SHEGOBIND, *tewarree*, AND OTHERS, (*Defendants*), *Respondents*.

THIS action was brought to set aside a sale of certain shares in mouzah Thulooa Khass, &c., on the ground that, according to Hindoo Law, the sellers, who are the father and elder brother of the plaintiff, could not legally alienate the property.

The Principal Sudder Ameen has not entered upon the merits of the case, but, in a very labored decision, has declared the hearing of the suit to be barred by lapse of time. The *bye-bil-wuffa*, which the plaintiff desires to cancel, is dated 31st July 1835, and the final *roobakaree*, in the Miscellaneous Department, declaring the sale absolute, is dated 24th November 1837. The question is, on which date did the cause of action arise? Calculating from the former, the period allowed by the law of limitation has elapsed; calculating from the latter, it has not. The plaintiff also attempts to show that he was in possession subsequently to the date of the *bye-bil-wuffa*; an attempt in which he has signally failed, and in further support of his right to be heard, he pleads minority up to the time at which he filed his plaint.

The Principal Sudder Ameen considers the cause of action to have arisen when the deed was executed; he rejects, upon most sufficient grounds, the plea of subsequent possession; and finds that the plaintiff, without doubt, attained his majority long before the expiration of the prescribed period. In regard to the last point, it is now hardly necessary to declare, that in the North Western Provinces a minor is bound to bring his action as soon as is practicable after the attainment of his majority in cases in which the legal period had elapsed prior to that event: a point, indeed, which is not disputed in this case.

The Court is of opinion that the appeal should be dismissed. The particular circumstances which gave rise to this and to several other Civil suits of a similar nature are well known to all persons connected with the Courts; but, on the present occasion, we have to deal only with the question of lapse of time. The pleas of possession and minority have been, as the Court thinks, very properly rejected; and it only remains to notice the argument of plaintiff, appellant, that a conditional sale is an incomplete transaction, and cannot constitute a ground of action until the sale has become absolute.

The Court is of a different opinion: it holds with the Principal Sudder Ameen that the cause of action arose at the time of the transfer. The injury done to the complainant was complete, unless the sellers availed themselves of the condition, and he could have no certainty that they could avail themselves of it. The rendering of the sale absolute was a mere consequence depending upon the original transfer, and not a separate transaction by itself. Even in the case of simple mortgages, if A should mortgage the land of B, B would have a ground of action without waiting till the land was brought to sale in satisfaction of the mortgage money.

Under this view of the case, the Court dismisses the appeal, and confirms the decree of the Court below.



The 6th January, 1851.

Present: { B. TAYLER,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 203 OF 1849. { Regular appeal from the decision of
Abdool Ruhman Khan, Principal Sud-
der Ameen of Benares, dated 17th
July 1849.

BALMOKUND, (*Defendant*), *Appellant*,
versus

BABOO JANKEE DASS, (*Plaintiff*), *Respondent*.

THIS claim is instituted for the recovery of Rs. 6,510-8, (being the amount, with interest and costs of suit, of a sum for which the plaintiff had previously obtained a decree), by bringing to sale the rights of Brijmohun Dass and Bullum Dass, in a talooqua by name Jungle Mehal, in zillah Mirzapore.

The plaint states, that on 27th December 1834, seven persons, Sahoo Lall, Brij Ruttun Dass, Brij Rohum Dass, Bullum Dass, Hurkishen Dass, Jankee Lall, and Muheet Narain, borrowed from the plaintiff Rs. 2,492-8, pledging, in payment thereof, their rights in the above property. On the death of some of the mortgagers, the survivors sold the estate to Gobindram and Girdhur Dass. Objections to this transfer, put in by the plaintiff before the Revenue authorities, were disallowed. The plaintiff afterwards sued the mortgagers and the transferees for the amount of his loan, and, on the 14th June 1845, obtained a decree from the Court of the Principal Sudder Ameen of Benares. Gobindram, one of the transferees, appealed, and his appeal was dismissed; meanwhile, the *zemindaree* rights in the property of Brij Rohum Dass and Bullum Dass were sold in execution of a decree had against them by Niamut Beebee, and were purchased by Balmokund, the defendant in the present action. The plaintiff has now made the original mortgagers or their heirs joint defendants with Balmokund in the suit, and proposes to bring to sale the rights which were purchased, as above, by Balmokund.

It is replied by Balmokund, that he was not a party to the suit in which the plaintiff obtained a decree in June 1845; that the property, which it is sought to sell, is in Mirzapore, and that he is himself a resident of that place; consequently, the action should be tried at Mirzapore, not at Benares, that on the date of the mortgage transaction, the seven mortgagers were possessed of *moostajiree* rights only, and mortgaged those rights, whereas what

Balmokund has purchased is the *zemindaree* interest of two of the seven persons; that the plaint is engrossed on a stamp of inadequate value; that certain costs are entered irregularly in the plaint; and that the plaintiff, on 24th October 1846, had been minded to bring to sale other property of his debtors, and forebore to do so from unworthy motives.

The Principal Sudder Ameen held that the suit is not brought for possession of the property, so as to necessitate the institution of suit in the Mirzapore Court; that the mortgage transaction was effected at Benares, and although the property is situate in Mirzapore, and the defendant, Balmokund, is resident there, yet the other defendants reside at Benares; that the decree formerly had by the plaintiff was passed against parties whom Balmokund now represents; that the objection by Balmokund, that he was not a party to the suit in which the plaintiff got a decree, is valueless, because Balmokund, not having at that time any connexion with the property, could not have been made a party to the suit; that the settlement proceedings prove a *moostajiree* settlement with the seven mortgagers, with continuous possession, until some years afterwards, a new settlement was made with two of the seven, as *zumeendars*. The Principal Sudder Ameen, after making a deduction of Rs. 200-12, an item irregularly charged by the plaintiff under the head of costs, passed a decree in the plaintiff's favor.

The pleas put forward in defence are reiterated by Balmokund in appeal.

The Court are of opinion, that the plea raised by the appellant, of want of jurisdiction in the Court trying the suit, is valid, and renders it necessary that the decision of the Principal Sudder Ameen be annulled. Section 5, Regulation II. of 1803 lays it down, that "the Zillah and City Courts, respectively, are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and, generally, of all suits and complaints of a Civil nature in which the defendant may come within any of the description of persons mentioned in Section 7, provided the landed or other real property to which the suit or complaint may relate shall be situated, or in all other cases, the cause of action shall have arisen, or the defendant, at the time when the suit may be commenced, shall reside as a fixed inhabitant within the limits of the Zillah or City over which their jurisdiction may extend." In the present case, whatever cause of action rested on the original mortgage to the plaintiff, ceased and determined when the plaintiff obtained his decree on the mortgage bond, and, very obviously, a cause of action cannot

be founded on the decree itself. The cause of action, is, therefore, the purchase by Balmokund of the rights of Brij Mohun Dass and Bullum Dass, in satisfaction of the decree of Niamut Beebee: the surviving mortgagers and their heirs, although they reside at Benares, and have been made defendants, have been improperly so made, for they have no interest whatever in the issue of the suit; the only defendant interested in the result is Balmokund, resident at Mirzapore, and purchaser in that zillah of disputed property therein situate, the suit, consequently, is determinable by the Mirzapore, not the Benares, authorities, and this Court has no alternative but to nonsuit the plaintiff. An order is passed accordingly.

The 6th January, 1851.

Present: { B. TAYLER,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 128 OF 1850. { *Special appeal from the decision of
Tussuddooq Hoossein Khan, Principal
Sudder Ameen of Azimgurh, dated
23rd August 1849.*

HURNAM RAI AND OTHERS, (*Defendants*), *Appellants,*
versus

BISHUMBUR RAI AND OTHERS, (*Plaintiffs*), *Respondents.*

IN this case, a special appeal was admitted in the following terms. "I am disposed to admit a special appeal to try, whether the Principal Sudder Ameen was not in error, 1stly, in declaring that no sale had taken place in the defendants' favor, though the plaintiffs did not, at the settlement, dispute the sale, and in regarding the settlement *roobakaree* on that point, as of force in favor of the plaintiffs, and not of force in favor of the defendants; 2ndly, whether the Principal Sudder Ameen has not violated judicial usage in holding the *wajib-ul-urz* to be an unimportant document as compared with the *roobakaree* of settlement; 3rdly, whether the plaintiffs, having repeatedly, before and after the settlement, admitted the provisions of the *wajib-ul-urz*, can now sue to set them aside; 4thly, whether there be not an illegality in the mode in which the plaintiffs have brought their claim into Court, inasmuch as it is admitted in the petition of plaintiff, that Sheo Narain has advanced funds, and has been made a co-plaintiff, on condition, that if the suit is gained, the said Sheo Narain

shall become proprietor of a quarter share of the property contested, an objection to this transaction having been urged by the defendants in the Court of first instance, and yet omitted to be noticed in the judgment either of the Sudder Ameen or the Principal Sudder Ameen."

The Court are not under the necessity of setting forth the particulars of this case, or of entering on the first three points of the certificate of special appeal, in the absence of any judgment by either of the lower Courts on the important fourth plea. The illegality of transactions resolving themselves into what the law of England designates as *champerty*, has been authoritatively declared by several precedents of both the Sudder Courts. This plea was raised by the defendants in the Court of the Sudder Ameen, who, without taking the plea into his consideration, dismissed the claim of the plaintiffs on other grounds. It was again urged when the suit was brought up in appeal before the Principal Sudder Ameen, and the Appellate Court was equally silent in respect to it. Thus the judgments of both the lower Courts are materially defective, and it is requisite to remand the suit to the Sudder Ameen's file, in order that the plea in question be tried and disposed of.

The whole case under this remand is open to reconsideration with reference to the first three points noticed in the certificate.

The 6th January, 1851.

Present: { B. TAYLER,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE NO. 214 OF 1850. { *Special appeal from the decision of*
C. R. Tulloh, Esq., *Judge of Mirza-*
pore, *dated 13th December 1849.*

SHUNKERDIAL PATUCK AND OTHERS, (*Defendants*), *Appellants,*
versus

HURNAM SINGH AND OTHERS, (*Plaintiffs*), *Respondents.*

THIS case is set forth at length in the printed decisions of the Zillah Courts for December 1849.

A special appeal was granted to try, "whether it was competent to the lower Courts to pronounce the *wajib-ul-urz* of settlement untrustworthy, the suit not having been brought to set the settlement aside; also, whether an auction sale of rights can

be declared invalid, on the ground that those, whose supposed rights are put up to sale, have no actual rights in the property exposed to sale."

The Court hold that there is nothing in the law which prevents the Judicial tribunals from declaring the *wajib-ul-urz* drawn up at the settlement fraudulent and void, even when the suit is not brought, in express words, to set the settlement aside. In the case before the Court, the paper first drawn up at the settlement, the *kyseeyut nuqsha putteedaree*, dated in September 1841, is not indeed congruous with the *wajib-ul-urz* dated in the following month, October 1841, but the settlement *roobakaree* refers to, and acknowledges, both, consequently, the object of the suit is, though not in precise words, to set aside the settlement.

On the second point of the certificate, although the judgment of the lower Court is somewhat confusedly worded, the Court do not understand the Principal Sudder Ameen to rule that the sale is invalid, because the party, whose rights were sold, had no rights, but that the auction purchasers of those interests have in reality purchased nothing.

The appeal is, for the above reasons, dismissed.

The 7th January, 1851.

Present : { B. TAYLER,
H. LUSHINGTON, } Judges,
H. W. DEANE, *Offg. Judge.*

CASE No. 215 OF 1850. { *Special appeal from the decision of*
G. Blunt, Esq., Judge of Allygurh,
dated 31st January 1850.

MEWA RAM, (*Defendant*), *Appellant*,

versus

RAJAH TEEKUM SINGH, (*Plaintiff*), *Respondent.*

THE English decree of the Zillah Court gives the history of the case. The plaintiff is the talooquadar: the settlement of mouzah Jusrana was made with Bukshee and Khosal, mooquddum biswahdars: and the defendant, Mewa Ram, is the purchaser of the mouzah, when it was sold for arrears of Government Revenue accruing during the settlement, which had been made with Bukshee and Khoshal. The Judge and the Principal Sudder Ameen have tried a wrong issue, their enquiries having been directed towards the question of proprietary right,

and having found that Bukshee and Khoshal possessed no proprietary right, they have reversed the auction sale, as if it were a matter dependent upon the decision. The Judge, in the concluding passage of his decree, prefers the claim of the plaintiff to that of the mooquddums, "in whose place, as purchaser of their *mooquddumnee* rights, the present appellant, (Mewa Ram), now stands," and the sentence indicates the error into which he has fallen.

A special appeal was admitted to try, "whether the fact found by the Zillah Court, that the biswahdars, with whom the settlement was made, did not possess any proprietary right in the village, can affect the title of the defendant, who purchased mouzah Jusrana at a sale for the recovery for arrears of revenue due from mouzah Jusrana itself, the settlement having been proprietary, and the sale having taken place under Regulation XI. of 1822."

The Court are of opinion that the question of proprietary right in no way affects the case. The land is pledged to the Government for the revenue assessed thereupon, and is liable to sale when balances occur without reference to the validity of the title of the party with whom a proprietary settlement has been made. That the settlement was proprietary is clear from the proceedings of the Revenue authorities, dated 21st May 1835, and 5th September 1835. It is not indeed disputed that the parties, with whom the settlement was made, were supposed to be persons possessing heritable and transferable rights in the soil, such as are described in Section 10, Regulation VII. of 1822, and are now commonly known by the term "*mooquddum biswahdars*," and whether they really were so, or not, does not alter the tenure by which the land was held. The title of the "engager" (such is the word used by the law), is not to be impeached.

The point, moreover, has been definitively determined in the case of Ranee Sheo Koonwur, &c., appellants, *versus* Sheodial Singh, &c., respondents, decided by this Court on the 26th August 1850. One of the pleas of the plaintiffs was, that "the defaulters having no actual rights, the sale was invalid;" and to this it had been replied by Government, who had been made a defendant, that "they held a lien on the land, which is perpetually hypothecated to them for the public revenue." This principle was fully recognized by the Court, who held that Section 29, Regulation XI. of 1822, was decisive upon the question. That Section enacts that "no claim of right founded on any act of the original engager, or any plea *impeaching the title by which the said engager may have held*, shall be allowed to impugn the right of the Revenue authorities to make the sale, or to bar or affect

the title and interest conveyed to the purchaser by the sale." The purchaser at a sale for arrears of revenue purchases from the Government the proprietary right in the land, not the rights and interests of an individual; or, using another mode of expression, he purchases a "title" not liable to impeachment, which is the same thing. When, therefore, the Judge regards the appellant, Mewa Ram, as "standing in the place" of those who have no rights, he misapprehends the law, and forgets the one great principle that the land is hypothecated to Government for the revenue assessed thereon.

Under this view of the law, the Court reverse the decisions of the Courts below, and dismiss the claim of the plaintiff.

The 7th January, 1851.

Present : { B. TAYLER,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 167 OF 1850. { *Special appeal from the decision of*
S. S. Brown, Esq., Judge of Goruck-
pore, dated 9th February 1850.

BRIJ LALL, (*Plaintiff*), *Appellant,*
versus

BYJOO NAEK, AND OTHERS, (*Defendants*), *Respondents.*

FULL particulars of this case will be found at page 47 of the printed decisions of the Zillah Courts for February 1850.

A special appeal was admitted to try, "whether the Judge has not erroneously ruled, that the alienation of the mouzahs, which are the subject of suit, on the 8th June 1847, was a valid alienation, inasmuch as the Court had, on the day previous, viz., 7th June 1847, passed an order that these properties be brought to sale in satisfaction of certain decrees against the proprietor thereof."

On this case being brought up for hearing in special appeal, the vakeels of the respective parties put in a *soolehnamah*, and requested that it be accepted by the Court as a decree. As there appears to be no objection to this mode of proceeding, it is ordered, that the *soolehnamah* be received, and the suit decided agreeably to its provisions. It is to be clearly understood that the Court pass no opinion on the point raised in the certificate of special appeal.

The 7th January, 1851.

Present : { B. TAYLER,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 185 OF 1850. { *Special appeal from the decision - of*
J. S. Boldero, Esq., Judge of Agra,
dated 30th April 1850.

HOLASEE SINGH AND OTHERS, (*Plaintiffs*), *Appellants,*

versus

TEEKARAM AND OTHERS, (*Defendants*), *Respondents.*

THE printed decisions for April 1850 give the particulars of this case.

A special appeal was allowed to try, "whether the lower Courts were not wrong in disposing summarily and without enquiry of the plea of the plaintiffs, that the *punchayet* formed by order of the Revenue authorities did not act in conformity to the rules laid down in Section 7, Regulation IX. of 1833.

It appears that a claim was preferred before the Revenue authorities by the plaintiffs to engage, as proprietors, for a ten-biswah share in several mouzahs, and that their claim was referred to arbitration. The *punchayet* delivered in an award unfavorable to the plaintiffs. In a suit afterwards brought in the Court of the Principal Sudder Ameen, the plaintiffs urged various objections to the award, all of which the lower Court disposed of by describing them to be *mamoollee* objections, and nonsuited the plaintiffs. The Judge affirmed the decision of the Principal Sudder Ameen.

The Court remark that the objections put forward by the plaintiffs to the award of the arbitrators have not, in the present instance, been tried. It was not sufficient for the Principal Sudder Ameen to designate them as *mamoollee* objections, but he should have stated distinctly his reasons for regarding them as of no force. The judgments of both the lower Courts are accordingly annulled, as incomplete, and the suit is remanded to the Principal Sudder Ameen's file in order that the pleas adverted to be duly disposed of.

The 7th January, 1851.

Present : { B. TAYLER,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 197 OF 1850. { *Special appeal from the decision of
J. S. Boldero, Esq., Judge of Agra,
dated 29th May 1850.*

PIRBHOO LALL, (*Defendant*), *Appellant*,
versus

NOOR KHAN, (*Plaintiff*), *Respondent*.

FOR the particulars of this case, the reader is referred to the printed decisions of the Zillah Courts for May 1850, page 24.

A special appeal was granted to try, "whether it was competent to the Civil Courts to entertain an action for the reversal of orders passed by the Criminal authorities under Act XXI. of 1841, such proceeding being apparently opposed to the principle declared in Construction 1158, and especially laid down by this Court in their letter to the Judge of Saharunpore, No. 481, of 28th April 1849, in a case analogous to the present, viz. the case of Ramboj and others, *versus* Jydia and others."

The Court are clearly of opinion that the plaintiff in this suit has no legal ground of action. The Magistrate, under the law "for the better prevention of local nuisances," ordered the removal of a wall, by means of which the plaintiff was found to have encroached on a public thoroughfare. The plaintiff might, if he chose, have applied for the jury or *punchayet* described in Section 3 of the Act, but he did not so apply. In the Construction 1158, the general principle is declared, that whenever it has been the intention of the legislature to render a summary decision open to review by a suit in the Courts, specific provisions to that effect has been made in the Regulations; and, moreover, in their letter to the Judge of Saharunpore, referred to in the certificate, this Court delivered their opinion in the following terms. "As stated above, no such provision is contained in Act XXI. of 1841, and consequently, according to the general principle laid down by the Court in Construction No. 1158, the Civil Court is not empowered either to entertain an action for the reversal of the Deputy Magistrate's order in the case under reference, or to issue an injunction for the purpose of staying execution thereof."

The judgments of both the lower Courts are, with reference to the above, reversed, and the suit of the plaintiff is dismissed.

The 11th January, 1851.

Present : B. TAYLER, Judge.

CASE No. 8 OF 1851. { *Special appeal from the decision of Khadim Hoossein Khan, Principal Sudder Ameen of Cawnpore, dated 14th February 1849.*

MOORTIZA KHAN, (*Defendant*), *Appellant*,
versus

WUZEER ALI AND GHAZEE KHAN, (*Plaintiffs*), *Respondents*.

THE suit is brought for possession of a share in the estate said to belong to Ghazee Khan, on the ground that he had been dispossessed of the share after he had obtained a decree against Mohumed Khan. The defendants deny that the decree was ever executed, or that the plaintiff, Ghazee Khan, has any right to the property, he being an illegitimate son. The Principal Sudder Ameen passed a decree, which did not adjudicate the points at issue, and he omitted to notice the plea of illegitimacy. A special appeal was granted to determine, whether the Principal Sudder Ameen had not acted contrary to judicial practice in having omitted to try the latter plea.

The Court observe, that the defendant furnished evidence to this fact, it was therefore the duty of the Principal Sudder Ameen to decide this material point, the omission renders the decision incomplete, and the suit must be remanded for retrial. As the Court of first instance has not expressed any opinion on the merits of the case, the suit is remanded for retrial to the Sudder Ameen, who should receive evidence to the possession of Ghazee Khan under his decree, and proof of his dispossession by the defendants, recording an opinion on all the pleas material to the issue.



The 13th January, 1851.

Present: { B. TAYLER,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE NO. 28 OF 1849. { *Regular appeal from the decision of
Villayet Ali Khan, Principal Sudder
Ameen of Allygurh, dated 27th Novem-
ber 1848.*

LALL POKPAL SINGH, (*Defendant*), *Appellant*,

versus

MUSSUMAT RANEE SENGUR AND MUSSUMAT RANEE MAHA KOONWUR,
WIDOWS OF RAJAH NARAIN SINGH, (*Plaintiffs*), *Respondents.*

THIS suit has been instituted for recovery of possession, by redemption of mortgage, of large landed property in zillah Allygurh, and to recover from the mortgagee surplus profits, amounting to Rs. 58,892-13. The full value of the suit is Rs. 1,99,258-13-4.

The plaint sets forth, that Narain Singh, the late husband of the plaintiffs, mortgaged his interests in 33 mouzahs, in zillah Allygurh, on 28th February 1838, to Peetumber Singh, (of whose heir, Pirthee Singh, the defendant, Lall Pokpal Singh, is guardian) for the sum of Rs. 30,000, the condition of the agreement being, that the accounts should be adjusted yearly. That on 30th August of the same year, Narain Singh borrowed from Peetumber Singh, under the same pledge, Rs. 21,000 more; that the death of Narain Singh took place in 1251 Fuslee, (on a date corresponding with 28th October 1844), and that of Peetumber Singh on 9th November 1845, and that as soon as the plaintiffs could ascertain how the accounts stood, a large balance appeared in their favor, for which, with redemption of the mortgage, they now sue.

The defendant admits the two loans amounting as above to Rs. 51,000, but avers, that in January 1840, Narain Singh borrowed a further sum of Rs. 23,000, and gave, in acknowledgment of it, a bond produced in Court. He pleads, further, that an adjustment of accounts took place at Muttra, on which occasion the accounts were brought up to 1251 Fuslee, and a balance of upwards of a lac of rupees appeared in the defendant's favor, consequently, on the showing of the defendant, the mortgage is still unredeemed, and the suit must be dismissed.

The Principal Sudder Ameen decreed the redemption of the mortgage, and awarded to the plaintiffs surplus profits amounting

to Rs. 30,151-14. The remainder of the claim he dismissed, charging the defendant, however, with all costs of suit.

The Court are of opinion that a full enquiry into the merits of this case has not been made. They allude especially to the proceedings of the lower Court in respect to the bond for Rs. 23,000, put in by the defendant, and the genuineness of which is denied by the plaintiffs.

The Court gather from the record that, on the 25th February 1849, the defendant's vakeel represented to the Principal Sudder Ameen that the witnesses to the execution of the bond, viz., Choonnee Singh, Rughole Singh, and Kewul Kishore, were in attendance, and requested that their evidence be taken, nothing however was done in the matter. On the 7th June following, Rughole Singh and Choonnee Singh presented petitions in person, praying that their depositions be recorded. On the 10th June, these witnesses again presented themselves, and stated to the Court that they were harassed by long attendance, and that they knew nothing whatever of the bond. On the 12th July, Rughole Singh gave in another petition, stating that the bond is genuine, and that he was prepared to certify it. On the 13th July, the defendant's vakeel moved that the deposition of Rughole Singh, with reference to his petition of the day before, be taken down. On the 14th July, the testimony of the third witness, Kewul Kishore, was recorded, and it supported the bond, and on the same day the Principal Sudder Ameen made an order, refusing to take the evidence of Rughole Singh, as the vakeel of the defendant had solicited, because, from the conflicting statements already made by him, it was plain that no reliance could be placed on his declarations: seven other witnesses to the fact of the loan of Rs. 23,000 were examined, and deposed in favor of the defendant.

The Court are at a loss to understand why the Principal Sudder Ameen allowed so long an interval to elapse without taking the evidence of the witnesses to the execution of the bond, who were stated to be in attendance so far back as the 25th February. The petitions of Rughole Singh and Choonnee Singh of the 7th June would lead to the supposition that they were at that time prepared to verify the bond, and it is not unreasonable to conclude, that their denial, on the 10th June, of all knowledge of the bond, may have been dictated by an anxiety to be relieved from the irksome attendance on the Court, which the Principal Sudder Ameen's tardy proceedings imposed on them. At all events, the long delay, which the Court have been called upon to notice, is not explained, and is open to much suspicion; and the Court are satisfied that the interests of justice require that the evidence to this part of the case be taken afresh.

In respect to other parts of the case, the Court are disposed to think that a very complete and satisfactory investigation has not been instituted. They accordingly remand the suit to the Principal Sudder Ameen's file, and direct that the whole case be tried *de novo*.



The 14th January, 1851.

Present : H. LUSHINGTON, Judge.

CASE No. 200 OF 1848. { *Regular appeal from the decision of Nuwab Mohumed Abdoollah Khan, Principal Sudder Ameen of Meerut, dated 11th September 1848.*

SURRUBSOOKH RAI, (*Plaintiff*), *Appellant*,

versus

AHMUD SHAH, SEERAJ-ODDEEN AND DOOME MULL, (*Defendants*),
Respondents.

THE parties in this suit are timber merchants having shops, or *tāls*, at Gurmuktesur ghât. They long had dealings with each other, but, falling out in 1846-47, they carried their disputes into the Criminal Courts, and obtaining there no satisfactory results, they betook themselves to the Civil Courts, the defendants preferring their claim to a large sum of money in the Mooradabad Court, and the plaintiffs bringing the present suit in the Dewanny Adawlut of Zillah Meerut.

The plaintiff's story is, that the defendants, aided by the thanahdar, and by certain influential residents of Gurmuktesur, carried away by force, from plaintiff's *tāl*, 158 *luttahs*, 40 of which were sold to the defendant, Doome Mull, and the other 118 carried away to Meerut by the defendant Seraj-ooddeen. Further, he sues to establish his right to the timbers of various descriptions lying in his own *tāl*, but claimed by the defendants, and lastly, for the amount of wages paid to the servants of the establishment, and interest on the several sums from the dates upon which the defendants became responsible for them.

The defendants, Ahmud Shah and Seeraj-ooddeen, declare the present to be no more than a countersuit brought against them in consequence of the suit which they had themselves lodged in the Mooradabad Court. They deny having ever removed the 158 *luttahs*, as falsely alleged by the plaintiff, as well as having ever interfered with the property stored in his *tāl*, but they assert that

the plaintiff had, on the 7th August 1847, sold to them 162 *luttahs* the same being part of the property in the *tāl*, and that when plaintiff prepared to sell them to some body else, they had forbidden him to do so.

As to the sale to Doomee Mull, they admit having sold to him 24 *luttahs*, but these belonged to themselves, and not to the plaintiff.

Doomée Mull states that he purchased 24 *luttahs* from Ahmud Shah and Seeraj-ooddeen, and sent them to Meerut; that he is not a timber merchant, and has nothing to do with the disputes of the real litigants. He does not know why Surrubsookh has made him a defendant.

The Principal Sudder Ameen refuses to believe that at a large town like Gurmuktesur, the defendants could have assembled carts and coolies sufficient to carry away by an act of violence (for this is insisted upon), 158 timbers, such as these are said to have been. The alleged complicity of the police seems to the Principal Sudder Ameen very improbable indeed, and he feels that his opinion is supported by the fact, that all the attempts of the plaintiff to implicate the thannahdar before the Criminal authorities failed. Even supposing that the thannahdar could have aided one party in an act of plunder, the Principal Sudder Ameen observes, how easy it would have been for plaintiff to have stopped the carts by lodging his complaint in any other thannah. The assertion of the plaintiff, however, that the property was removed by force with the aid of the police, is throughout treated by the Principal Sudder Ameen as extravagant and incredible, and the plaintiff loses much by insisting upon this plea. Doomee Mull was unnecessarily made a defendant, and the claims on account of servants' wages and interest were, in the opinion of the Principal Sudder Ameen, advanced for no other purpose than that of exaggerating the pretended injury, and raising the sum demanded to as high a figure as possible.

The Court, on hearing the appeal preferred by Surrubsookh, coincides entirely in the view of the case which has been taken by the lower Court. That there may be accounts between the parties not yet adjusted is possible enough, for it is admitted that they have had pecuniary dealings together; but when one party, instead of placing the disputed items of account distinctly before the Civil Court, brings forward an extravagant charge, almost amounting to a charge of dacoity, and hopes, by alleging a single act of plunder, to save himself all further trouble, he cannot expect to obtain a decree. The Court therefore fully agrees with the Principal Sudder Ameen in regard to the principal point at issue, but there are two minor points, in respect of which some alteration is necessary.

The decree of the lower Court dismisses the claim of the plaintiff to the 158 *luttahs*, the servants' wages and interest, and as the timber in store is, by his own admission, in the possession of the plaintiff, and is not claimed by defendants, a decree for this item (*mal mojoodeh*) is given in favor of the plaintiff, who is however made responsible for all the costs.

Amongst these costs are the fees paid by Doomee Mull to his vakeel, which have been calculated on the total value of the suit, whereas only the value of 40 *luttahs* was at issue between the plaintiff and *this* defendant. If Doomee Mull chose to defend the whole suit, he did so at his own expence. The sum therefore chargeable to the plaintiff on account of Doomee Mull's costs must be calculated upon the estimated value of the 40 *luttahs* only.

In like manner, the costs chargeable to the plaintiff on account of the defendants, Ahmud Shah and Seeraj-ooddeen, must be diminished in proportion to the value of the 162 *luttahs*, which were deposited in the plaintiff's *tdl*, and which these defendants distinctly claimed in the *juwab dawa* as belonging to them by purchase, a declaration which is inconsistent with the remark of the Principal Sudder Ameen, that the defendants had no claim upon the property in store in plaintiff's *tdl*. These 162 *luttahs* then were disputed between the parties, and a decree for them having been given to the plaintiff, a proportional deduction must be made from the amount costs charged to him in the Court below.

The vakeel of the respondent consents to these modifications of the decree, and it is therefore unnecessary to carry the case before a full bench.

In all other respects the decree of the Court below is confirmed.

The 14th January, 1851.

Present : H. LUSHINGTON, Judge.

CASE No. 14 OF 1851. { *Special appeal from the decision of
J. S. Clarke, Esq., Judge of Azimgurh,
dated 27th July 1850.*

DOOKHIT, *kulwar*, (*Defendant*), *Appellant*,

versus

SYED FAQUEER HOOSSEIN, (*Plaintiff*), *Respondent*.

THE particulars of this case are to be found in the printed decisions, as above indicated, and in the previous decision of the Judge of Azimgurh, dated 12th February 1848.

Shah Hyder Ali, also a defendant, sold a fractional share in mouzah Kullenderpore to the defendant, Dookhit, *kulwar*. The plaintiff sues to set aside that sale, and become the purchaser himself by the Mohumedan law of præemption.

The points which have been finally ruled in the several decisions are, that the claim of a *shafee* is not barred by a refusal on his part to purchase before the actual sale took place; that the plaintiff is a *shafee* by share and by neighbourhood, and that he has not forfeited his claim by delaying to bring it into Court for 14 months.

The Principal Sudder Ameen, however, in his decree 14th March 1848, distinctly declares that plaintiff has failed to observe the necessary forms of law, that is to say, the immediate claim and affirmation by witness, called by the Mohumedan law *tullub i mowasibit o ishtishad*, and on the ground of this failure he dismisses the suit. The Judge, in appeal, apparently misapprehends the reasoning of the Principal Sudder Ameen, for he writes, that the Principal Sudder Ameen "adhered to his former " decision on the main point; that the plaintiff was not entitled " to the right claimed, as the evidence of the defendants proved " that he had declined to purchase the property when offered " to him." But this refusal to purchase was *not* the reason why the Principal Sudder Ameen rejected plaintiff's claim: that point had been finally disposed of by the decree of the Zillah Court, 12th February 1848. The reason was, that the immediate claim and affirmation by witness had not been proved, and the ground of dismissal has not been impugned by the Judge. A special appeal was therefore admitted, because the Judge had reversed the decretal order of the Principal Sudder Ameen without controverting the point upon which that order is mainly founded.

Unless it be held, in opposition to the opinion of the Principal Sudder Ameen, that the necessary forms were observed by the *shafee*, the decree of the Principal Sudder Ameen's Court cannot be set aside. The Judge has set aside that decree without trying the point. The decision of the Zillah Court is therefore annulled, and the case remanded to the Judge's file, in order that he may try the point which he has left unnoticed, as above indicated, but without re-opening the whole question or re-considering those points which are herein declared to have been finally disposed of.



The 18th January, 1851.

Present: { B. TAYLER,
A. W. BEGBIE, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 40 OF 1849. { Regular appeal from the decision of
Qazie Yar Ali Khan, Principal Sud-
der Ameen of Zillah Jounpore, dated
18th November 1848.

MUTEUR SINGH AND URJUN SINGH, (*Plaintiffs*), *Appellants*,
versus

HURSHUNKER SINGH AND OTHERS, (*Defendants*), *Respondents*.

THE father of the plaintiff, (Buhoreenarain,) purchased the entire estate of Godhoon, and half of mouzah Hydreepore, at public sale. Falling in balance, the estates were again advertised for sale in 1815; but, on the defendant Hurshunker making good the balance, a farming lease for life was granted to him, and he continued to hold the estates on this tenure till the end of 1840 A. D., when a fresh settlement was made with him, and he was admitted to engage as *proprietor*. The plaintiff did not prefer his claim at that time, but, in 1848, on applying to the Collector to be reinstated, he was, by that authority, referred to the Civil Court.

The defendants, in reply, asserted that they were entitled to hold the estates as *proprietors* under the arrangements made by the Revenue authorities; that plaintiffs did not appear at the time of the settlement to make any claim; and that they, (the defendants) having been in possession since 1223 Fuslee, could not now be ousted, and that the plaintiffs' suit was barred by the law of limitation.

The Principal Sudder Ameen dismissed the plaintiffs' suit under the law of limitation, being of opinion, that he should have preferred his claim within 12 years from the date on which the estates were placed under *kham* management by the Collector, viz., the Fuslee year 1222; and that the period of 12 years could not be calculated, (as supposed by plaintiffs) from the date on which the defendant, Hurshunker, was admitted to engage as *proprietor*.

The Court cannot concur in the opinion expressed by the Principal Sudder Ameen. They hold that the cause of action arose from the date of the proprietary engagement entered into by the defendant, Hurshunker. The sequestration of an estate by the Collector for balances, or its transfer to a farmer, is not

destructive of the proprietary rights of the party in balance during the period of *kham* management, or of a farming lease; the proprietor's rights are merely in *abeyance*, and may be revived on the expiration of the attachment or farm: the Principal Sudder Ameen has, evidently, confounded *sequestration* with *confiscation*. The case of Puhloo Singh and others, appellants, *versus* Sheo Dutt Singh and others, respondents, decided by this Court on the 11th January 1847, is cited by the Principal Sudder Ameen in support of his opinion; but that case is not in point, as in that instance the rights of the former proprietor had been *confiscated* for evasion of Criminal process; a measure which utterly annihilated the pre-existent right of property.

The Court accordingly reverse the decision of the Principal Sudder Ameen, and remand the case for retrial with reference to the merits.

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The 18th January, 1851.

Present: { B. TAYLER,
A. W. BEGBIE, } Judges,
H. W. DEANE, Offg. Judge.

CASE NO. 145 OF 1850. { *Special appeal from the decision of Moul-
vee Mohamed Hoossein Khan Buhadur,
Principal Sudder Ameen of Zillah
Barcilly, dated 8th December 1849.*

OODOO SINGH, (*Defendant*), *Appellant*,
versus

MUSSUMAT HUR KOONWUR, (*Plaintiff*), *Respondent*.

THIS is the second time this case has been before this Court in appeal. On the 14th July 1849; the case was remanded by Mr. Lushington, for the reasons stated in his proceedings, which will be found at page 231 of the printed reports for 1849. The object in remanding the case was, that the Principal Sudder Ameen should enquire into the fact of the alleged transfer to the plaintiff by Bidhee Singh. If that were found to have actually taken place, a decree, in favor of the plaintiff, would follow as a matter of course. But the Principal Sudder Ameen, notwithstanding his having found that the alleged transfer is a fiction, decrees in the favor of plaintiff; the reason assigned being, that the names of Sewa and the other defendants had not been registered in the place of Bidhee's, and that these defendants had filed confessions of judgment. These reasons are obviously inconclusive, for the non-registration of names

does not deprive a person of his *zemindaree* rights, and the confessions of judgment were palpably collusive. The Principal Sudder Ameen had only to deal with the plaintiff's cause of action, which was the alleged sale to her of his rights by Bidhee. As that allegation is declared by the Principal Sudder Ameen to be *false*, the plaintiff's claim falls to the ground. In the words of the certificate of special appeal, the Principal Sudder Ameen ought, "on his own showing to have dismissed the plaintiff's claim "instead of decreeing in her favor."

The Court accordingly reverse the Principal Sudder Ameen's decision, and dismiss the suit. Costs payable by respondent.

The 18th January, 1851.

Present : { B. TAYLER,
A. W. BEGBIE, } Judges,
H. W. DEANE, Offg. Judge.

CASE NO. 252 OF 1850. { *Special appeal from the decision of*
S. S. Brown, Esq., Judge of Goruck-
pore, dated 27th June 1849.

RUTTOO SAHOO, (*Plaintiff*), *Appellant*,
versus

SUSTEE RAM AND OTHERS, (*Defendants*), *Respondents*.

THE report of this case will be found at page 135 of the printed reports for zillah Goruckpore, for the year 1849.

A special appeal was granted to try, "whether the exposition of "the law, contained in the following passage in the Judge's decision, be correct or otherwise."

"The order therefore remained a dead letter, and as the settlement arrangements were in consequence incomplete, the "Revenue authority had power, under Section 20, to determine "the distribution of the profits as well as the right of engagement "with Government, under the Clause 1, Section 10; nor can "these arrangements become now the subject of a Civil suit."

In the opinion of the Court, the above exposition of the law is *not* correct. Section 20 of Regulation VII of 1822 does not confer the power on Collectors of remodelling arrangements previously made under Section 10. On the contrary, Section 10 is not among the Sections enumerated in Section 20, of which the powers are to be "*ordinarily* exercised by Collectors when employed in "making or revising settlements of the land revenue." The finality of the arrangements made under Clause 1, Section 10 of

the Regulation is contended for by the appellant, who argues that Section 20 "conferred no authority on the Collector to disturb "the subsisting rights and arrangements, which were affirmed "and maintained at the settlement," and this Court are of opinion, that the plaintiff's statement is agreeable to law. The Judge's confirmation of the order of the lower Court being therefore based on an erroneous conception of the law, cannot be maintained. His decision is accordingly annulled, and the case remanded for retrial with reference to the foregoing observations.

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The 18th January, 1851.

Present : { B. TAYLER,
A. W. BEGBIE, } *Judges,*
H. W. DEANE, *Offg. Judge.*

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CASE No. 142 OF 1850. { *Special appeal from the decision of*
S. S. Brown, Esq., Judge of Goruck-
pore, dated 15th November 1849.

THAKOOR BHOWANNEE BUKSH AND MUSSUMAT UMLAK KOONWUR,
(*Plaintiffs*), *Appellants*,
versus

OOGUN, *tewarree*, (*Defendant*), *Respondent.*

FOR the particulars of this case see pages 240 to 242 of the printed decisions for zillah Goruckpore, for the year 1849.

A special appeal was granted on the following grounds;—

" I admit a special appeal to determine whether the Judge has " not acted contrary to judicial usage in adjudicating the case in " favor of the defendant Oogun, *tewarree*, on a new plea urged in " his petition of appeal, inconsistent with that on which he " defended the suit in the Court of first instance, and in admit- " ting fresh evidence in support of that plea, and whether he " ought not, under the circumstances, to dismiss the appeal."

The Court, although admitting that the nature of the plea in appeal is somewhat different from that urged by the defendant, Oogun, *tewarree*, in the Moonsiff's Court, are of opinion that the inconsistency is not so great as to render the dismissal of the defendant's appeal necessary. Both parties appear to have concealed *part* of the truth in their pleadings in the Moonsiff's Court, the plaintiffs alleging that the deed, under which the estate had been transferred to Sudanund, was a simple mortgage, whereas it eventually proved to be a deed of conditional sale, the period of foreclosure of which expired in 1211 Fuzlee, corresponding with

1804 A. D. The defendant, Oogun, *tewarree*, on the other hand, did not admit that there had been either a mortgage or *conditional* sale, but would have led the Court to believe that the estate had been sold *unconditionally* to Sudanund. It is, however, clear, that the conditional sale under the deed produced in the Moonsiff's Court became absolute in 1211 Fuslee, corresponding with 1804 A. D., and therefore the provisions of Regulation XVII of 1806, (which are declared by Construction No. 672, not to have retrospective effect) do not apply, and the mortgagers have lost their right of redemption. Sudanund was *in fact* the proprietor by *purchase*, although the purchase had not been effected exactly in the manner originally asserted by the defendant, Oogun, *tewarree*. The decision of the Judge is therefore quite just, and the Moonsiff was clearly wrong in declaring that the plaintiff's right to redeem had not been lost. The Court accordingly dismiss the appeal, with costs.

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The 20th January, 1851.

Present : { B. TAYLER,
A. W. BEGBIE, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 149 OF 1850. { *Special appeal from the decision of
J. T. Rivaz, Esq., Judge of Benares,
dated 12th September 1849.*

RAMPUTT, (*Defendant*), *Appellant*,
versus

ALLYJOO, (*Plaintiff*), *Respondent*.

THIS case will be found at page 106 of the printed reports for *Sillah Benares* for 1849.

A special appeal was admitted to try, 1st, "whether, with reference to established precedents, the plaintiff ought not to have been nonsuited, in consequence of his not having produced a certificate of his being the heir of *Russooljoo*, under the provisions of Act XX. of 1841; 2nd, whether the Principal *Sudder Ameen* and Judge have not overcharged the appellant in the matter of costs, with reference to the portion of the claim dismissed by them."

With regard to the first point in the certificate, the Court are of opinion that the nature of the claim is not such as to necessitate the production of a certificate of heirship under Act XX of 1841. That enactment was intended to facilitate the collection of debts *on succession*, which may be *payable in respect of the estates of deceased persons*. The present suit is to recover the

price of goods, and the amount of loss sustained by the non-delivery. The appellant's objection under this head is accordingly overruled. With regard to the second point of the certificate, there can be no doubt that there has been a mistake committed by the Principal Sudder Ameen and Judge in adjudicating the costs. The Principal Sudder Ameen's phraseology is somewhat obscure, but the Court agree with the Judge in construing his order as *dismissing* the claim to Rs. 1,500, on account of *damages*, and for this proportion, therefore, the plaintiff should have been made to pay costs, whereas defendant has actually been saddled with costs on the entire claim of Rs. 3,100 *minus* Rs. 100. The order of the two lower Courts are accordingly amended, and costs will be charged to the appellant on the sum of Rs. 1,600, and no more.

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The 27th January, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 161 OF 1850. { Regular appeal from the decision of
Yoosuf Hussun Khan, Principal Sud-
der Ameen of Futtehpoore, dated 25th
February 1850.

MUSSUMAT BOLEE BEEBEE AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

HOOSSEIN BUKSH KHAN AND OTHERS, (*Defendants*), *Respondents*.

THIS suit was brought in the lower Court for the recovery of certain shares of ancestral property in land, that is to say, Mussumat Bolee Beebee, Dan Beebee and Taj Beebee, claimed to be recognized as sharers to an extent specified in four mouzahs, Tuffeerabad, Burrowra, Gopalpore, and Soneekhera, as the co-heirs and successors of Shumsheer Khan, the original proprietor. A fourth plaintiff, Mussumat Ruheem Beebee, claimed to be recorded in Burrowra, Gopalpore, and Soneekhera, only, by reason that the rights of her father Ahmud Ali Khan, in the fourth mouzah (Tuffeerabad) had been alienated by public sale: *wasildt* is further claimed to the amount of Rs. 24,729-14. The full value of suit is Rs. 30,109-9-3.

The pedigree of the family may be thus set forth.

Shumsheer Khan,

|
Ahmud Ali Khan—Khoashyd Ali—Ali Buksh—Bolee Beebee—Dan Beebee—Taj Beebee.

|
Ruheem Beebee. Ghulam Ali—Hoossein Buksh Khan—Zeemab Beebee—Roohum.

Three of the plaintiffs are, consequently, the daughters of Shumsheer Khan, and the fourth plaintiff is his grand-daughter by his eldest son Ahmud Ali Khan. The principal defendant, Hoossein Buksh Khan, is the grandson of Shumsheer Khan by Khoshyd Ali, the second son of Shumsheer Khan.

The plaint states, that the whole property was possessed by Shumsheer Khan during his life, that Shumsheer Khan died on 23rd November 1833, that his eldest son, Ahmud Ali Khan, succeeded him, and held jointly, with his sisters, the plaintiffs, Mussumat Bolee Beebee, Dan Beebee and Taj Beebee; that Khoshyd Ali died in the life-time of his father, by which event his offspring is precluded from succession; and that Ali Buksh, the third son of Shumsheer Khan, was lost; Ahmud Ali Khan died in 1839 A. D., and at the settlement, which took place in 1840, Hoossein Buksh Khan contrived to be admitted to sole engagements, pleading in his favor a *hibbehnamah bil-awuz* from his grandfather Shumsheer Khan. It is urged by the plaintiffs, that the above document has been pronounced by the Courts to be a forgery, inasmuch as when the interest of Ahmud Ali Khan in Tuffeerabad, which had been pledged by him during his life-time, was sold in 1841, and was purchased by Bhowannee Singh and Ishree Singh, a suit by the purchasers against Hoossein Buksh Khan, for possession of the right they had bought, was decided in their favor, and the *hibbehnamah* rejected in a regular suit decided in July 1845. Mussumat Bolee Beebee, Dan Beebee, and Taj Beebee aver, that they have held possession of their shares in mouzah Tuffeerabad until 1841, the date on which the rights therein of their brother were sold, consequently, that their suit is brought within the legal period of 12 years. They also aver, that as respects the other property, they have held possession of their shares till 1840, when the settlement was made with Hoossein Buksh Khan. Ruheem Beebee pleads that her suit is within the legal period, whether her cause of action be taken to be the death, in 1839, of her father Ahmud Ali Khan, or the settlement, in 1840, with her cousin Hoossein Buksh Khan.

There are several classes of defendants, 1st, Hoossein Buksh Khan, 2nd, Bhowannee Singh and Ishree Singh, who, as above mentioned, purchased the interest of Ahmud Ali Khan in mouzah Tuffeerabad, and 3rd, persons to whom the rights, of which Hoossein Buksh Khan got possession at the settlement, have been alienated from time to time.

The answer of Hoossein Buksh Khan is, that the cause of action is thrown back so far as 1833, since which time he has held sole possession under the *hibbehnamah* from Shumsheer Khan. The suit therefore, according to this plea, is barred.

Bhowannee Singh and Ishree Singh join with Hoossein Buksh Khan in fixing the cause of action at 1833, and they add, that when they purchased the interest of Ahmud Ali Khan in Tuffeerabad, it was not then denied that the four-anna share, which they bought, belonged to Ahmud Ali Khan alone.

It is unnecessary to give in detail the pleas put forward by the remaining class of defendants. The validity of their defence rests on the validity of the defence set up by Hoossein Buksh Khan.

The Principal Sudder Ameen dismissed the suit under the law of limitations. He has observed that the *fouteenamah*, drawn up in 1834, of Shumsheer Khan, contains no mention of the names of his daughters, and that the daughters were not recorded in succession to him; that a suit in regard to mouzah Burrowra, instituted by Shumsheer Khan, was carried on after his death by Ahmud Ali Khan alone, and that the plaintiffs, notwithstanding that a notice was issued inviting their attendance, did not appear; that the decree obtained by Ahmud Ali Khan, in regard to mouzah Burrowra, was obtained by him alone; that in 1834, the female relatives of Shumsheer Khan did not appear when a notice was issued for a division of shares in one of the villages now in dispute; that Ahmud Ali Khan having pledged his right in Tuffeerabad in 1836, the cause of action cannot be calculated from the subsequent date, 1841, when the aforesaid right was sold; that when Bhowannee Singh sued for possession in Tuffeerabad, the present plaintiffs were not made defendants; that they are not shown to have taken any part in the *tehseel* accounts, which were rendered on the death of Shumsheer Khan. In regard to the plaintiff, Ruheem Beebee, the Principal Sudder Ameen has remarked, that had she sued separately, as heir of her father, her claim would be within the legal period, but is barred when suit is brought for the recovery of property held by her grandfather, and that her claim is further vitiated by its association with that of the other plaintiffs.

In the propriety of this judgment the Court do not concur. It is shown that Ahmud Ali Khan was duly recorded in succession to his father, and held possession up to the date of his death; and such possession is not, in the opinion of the Court, as respects the claim of Mussumat Bolee Beebee, Dan Beebee, and Taj Beebee, an adverse possession. It can be accounted adverse only on proof by the party resisting their pretensions of their exclusion under special and extraordinary circumstances. The cause of action the Court hold to be one and the same as regards all the plaintiffs; it is the dispossession under the settlement in 1840, with Hoossein Buksh Khan, and under this view, there is no reason why the claim of Ruheem Beebee may not be tried along with that of

Bolee Beebee, Dan Beebee, and Taj Beebee. The defendant, Hoossein Buksh Khan, has relied, the Court remark, on possession in virtue of the *hibbehnamah* from Shumsheer Khan, and his witnesses depose to his possession in general terms; the *hibbehnamah* would, however, appear to have been authoritatively declared to be invalid, and if so, it is not open to Hoossein Buksh Khan first to plead possession in virtue of the *hibbehnamah*, and when that plea fails him, to plead possession irrespectively of the *hibbehnamah*.

The Court, entertaining no doubt whatever that the suit may be lawfully tried on its merits, remand it to the file of the Principal Sudder Ameen for that purpose.

The 27th January, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. LUSHINGTON, }
 { H. W. DEANE, Offg. Judge.

CASE No. 119 OF 1850. { Special appeal from the decision of
 Abdool Azeez Khan, Principal Sud-
 der Ameen of Goruckpore, dated 20th
 December 1849.

RAJAH ODEYNARAIN MULL, (*Plaintiff*), *Appellant*,

versus

THAKOOR SINGH AND OTHERS, (*Defendants*), *Respondents*.

THIS suit was brought to obtain possession of eight beegahs of land, stated to appertain to the plaintiff's village of Acre Berinjee, together with *wasilât*, from 1244 to the *rubbee kists* of 1255 Fuslee.

The plaintiff's claim was dismissed by the Court of first instance, and the decision was affirmed in appeal by the Principal Sudder Ameen.

A special appeal was allowed to try, whether the lower Court has not erred in dismissing the plaintiff's claim under the statute of limitations, inasmuch as the plaintiff was admitted to engagements by the Revenue authorities within 12 years from the date of institution of suit.

The Court are not disposed to think that the judgment of the lower Court can be disturbed under the above certificate. The plaintiff is proprietor of the village of Acre Berinjee, and the defendants own the adjoining mouzah of Kuthowleea. At the settlement effected in 1836, the piece of land in dispute was measured within the *rugbeh* of mouzah Acre Berinjee. It was however cultivated by the defendants, residents of Kuthowleea, and a summary suit by the plaintiff for rent of the land was thrown out by the Revenue Court. The plaintiff then applied to the Civil Court for an order which should recognize his proprietary title to the land. The Court of first instance found that it had been formerly settled with the defendants as part of mouzah Kuthowleea, and that they had been in possession of it from time immemorial, and the Court rejected the plaintiff's claim under the limitation law. An appeal was carried up to the Court of the Principal Sudder Ameen, and though that authority has not found the fact of former settlement with the defendants so distinctly as the Sudder Ameen had found it, he yet has entirely concurred with the Court of first instance in holding that possession by the defendants had been proved for a length of time sufficient to bar the cognizance of the suit. The circumstance, that the disputed land was measured within the *rugbeh* of the plaintiff's village in 1836, whether this were brought about by fraud on the part of the plaintiff, or inadvertence on the part of the settlement authority, cannot, in the opinion of the Court, in any way affect the right of the lower Courts to pronounce the decision at which they have arrived.

The appeal is therefore dismissed.

The 27th January, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. LUSHINGTON, }
 { H. W. DEANE, } *Offg. Judge.*

CASE No. 198 OF 1850. { *Special appeal from the decision of*
 A. Lang, Esq., Judge of Allahabad,
 dated 29th May 1850.

SEETUL BUKSH, (*Plaintiff*), *Appellant,*
 versus

ADHAR SINGH AND JURBUNDHUN SINGH, (*Defendants*),
 Respondents.

THE particulars of this case will be found at page 129 of the printed decisions of the Zillah Courts for May 1850.

A special appeal was admitted to determine, whether the plaintiff's suit has been correctly found by the lower Courts to be barred by the statute of limitations.

The plaintiff in this suit is the brother of Gundhuruf Singh, (deceased), and uncle of the two defendants. Gundhuruf Singh died in 1843, and his sons, the defendants, have been recorded in the Collector's books in succession to him. The plaintiff has brought suit for his share of the property, which, as he asserts, he held conjointly with Gundhuruf Singh. The Principal Sudder Ameen rejected his claim, as barred by lapse of time. The Judge affirmed this decision in the following words. "The Principal Sudder Ameen has dismissed the plaintiff's claim, considering the pleas set forth by the defendants established, and as it is quite clear that the plaintiff's claim is inadmissible under the limitation Regulations, the defendants having been in undisturbed possession of the property claimed for considerably more than 12 years, I see no reason for interfering with the Principal Sudder Ameen's decision; without summoning the respondents, therefore, I dismiss the appeal."

The Court consider the above finding of the Judge to be too vague. The record of the case shows, that at the settlement in 1833, Gundhuruf Singh expressly allowed the right of the plaintiff to a share in the property, and assigned, as his reason for not effecting a division, that the property was too small to be divided. The question, therefore, which arises, is, whether Seetul Buksh maintained, until the death of his brother in 1843, possession of the right, which, in 1833, his brother Gundhuruf Singh had admitted to belong to him. If Seetul Buksh did maintain such possession, the suit is clearly not barred; if not, it is incumbent on the Judge, in deciding that the suit is barred under the limitation law, to fix the period of dispossession.

The suit is remanded for retrial to the Judge's file, with reference to the above remarks.



The 29th January, 1851.

Present : B. TAYLER, Judge.

CASE NO. 29 OF 1851. { Special appeal from the decision of
Jowalapershad, Additional Principal
Sudder Ameen of Azimgurh, dated
5th September 1850.

MOULVEE GHOLAM HUSSUN AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

SHAH MUHBOOB ALLUM AND OTHERS, (*Defendants*), *Respondents*.

THE suit was instituted to recover Rs. 8-11, the rent of a field (No. 454) for the year 1255 Fuslee.

The moonsiff finds that the plaintiffs have collected rent from the *ryot*, who cultivates the field, from the time of the settlement of the village to the year 1254, and that the land is recorded as belonging to the plaintiffs.

A special appeal was granted to try, "whether the Principal Sudder Ameen has acted in conformity with judicial usage in having directed the plaintiff to establish his right to the field before he can sue for the rent."

It appears that a *butwarrah* had been made between the parties of their respective fields, but never carried into execution. The defendants, after a long period, applied to the Revenue authority to enforce this *butwarrah*, but their application was unsuccessful.

The *butwarrah* not having been carried into effect, and the land having been recorded as the property of the plaintiffs, the Principal Sudder Ameen acted irregularly in referring the plaintiffs to a regular suit to establish that right to the land. The point on which the decision rests, is, whether the plaintiffs have been in possession of the land and have received the rent from the time of the settlement to the year 1254 Fuslee.

The Principal Sudder Ameen's decision is reversed, and the suit remanded, in order that he may pass another decision with reference to the foregoing remarks.



The 29th January, 1851.

Present : B. TAYLER, Judge.

CASE No. 28 OF 1851. { *Special appeal from the decision of Jowalapershad, Additional Principal Sudder Ameen of Azimgurh, dated 5th September 1850.*

GHOLAM HUSSUN, (Plaintiff), Appellant,

versus

FUSSEE-OOLLAH, (Defendant), Respondent.

THE suit was brought for the recovery of five biswahs of land, forming part of a portion comprising one beegah and a half.

A special appeal was granted to try, "whether the Principal Sudder Ameen had not acted contrary to judicial usage in having omitted to determine an important plea material to the issue."

The plaintiff's right to the quantity of land, claimed by him, is not denied by the defendant. The Moonsiff, after going himself to the spot, and making a careful investigation, decided that the five biswahs sued for was included in the one and a half beegah.

The Principal Sudder Ameen, although the suit was brought to set aside the entries in the putwarree's papers, as erroneous, appears to have decided the case on the putwarree's evidence, he reversed the Moonsiff's decision without determining whether the land formed a portion of the one and a half beegah or not.

As the Principal Sudder Ameen has omitted to determine whether the five biswahs is in excess of the one and a half beegahs of land claimed by the plaintiff, his decision is reversed, and the suit remanded, in order that he may consider this point, and pass a decision with reference to the plea of the plaintiff, the determination of which is material to the adjudication of the suit.



The 29th January, 1851.

Present: H. W. DEANE, Offg. Judge.

CASE No. 214 OF 1849. { *Regular appeal from the decision of Mr. J. Campier, Principal Sudder Ameen of Mirzapore, dated 31st August 1849.*

BABOO MOONNA LALL AND BABOO LUCHMEENARAIN, (*Plaintiffs*),
Appellants,
versus

GUNGAPERSHAD AND OTHERS, (*Defendants*), Respondents.

THE particulars of this claim and the judgment passed thereon by the Principal Sudder Ameen are as follows:—

“ Claim, to obtain a redemption from mortgage of mouzah “ Nukuhra, *uslee* and *dakhlee*, pergunnah Huvelee Chunar, at a “ jumma of Rs. 1,501, or three times thereof Rs. 4,503: to uphold “ possession thereof, by setting aside the orders of the Criminal “ and Circuit Courts, dated respectively the 27th May and “ 1st July 1848; to expunge the names of Gungapershad and “ Gokul Dass, ruhindars or mortgagees, nephews of Baboo “ Balmookund, from the Government record, and to recover Rs. “ 9,168-2-2, principal and interest, on account surplus proceeds, “ otherwise *wasilât* of the said estate from 1240 to 1254 Fuslee, “ as specified at the foot of plaint, as per conditions entered into “ in a *byenamah* or deed of sale executed by Bullum Dass, Brij- “ rumun Dass, Baboo Hurkishen Dass, and Bissashurpershad, “ dated 24th October 1847, and an agreement executed by Baboo “ Sadho Lall of Benares, dated 15th June 1832: total amount of “ claim, Rs. 13,671-2-2.

“ In this case the plaintiffs allege that, according to *buhêe khata*, a “ sum of Rs. 4,000 was due to Gopal Dass and Chote Lall, nephews “ of Lalla Sadho Lall, of Chunar, from Sadho Lall of Benares: “ the latter borrowed from them the further sum of Rs. 1,000, “ making a total of Rs. 5,000, for which he executed an *ikrarna- “ mah* or agreement, dated 15th June 1835, pledging his estate “ of mouzah Gungpore Sheopore, with the following conditions, “ that out of the collection of the said estate, a sum of Rs. 2,975 “ should be paid for Government revenue, &c., and out of the rest, “ part should go for payment of the interest due, namely, of “ Rs. 4,000, at eight annas per cent., and of Rs. 1,000, at one rupee “ per cent. per mensem; should there remain any surplus, it should “ go for the liquidation of the amount principal, and should the

" collections be not sufficient for the above payments, the mortgagee was at liberty to collect the deficiency from the estate of Nukuhra; that the mortgagee, whose heirs are Gungapershad and Gokul Dass, two of the defendants in the case, had entered into possession, and realized from the estate of Gungpore Sheopore, from the year 1240 to 1242 Fuslee, the sum of Rs. 11,163-10-3, and that he had not paid any Government revenue for 1242 Fuslee, in consequence of which the mortgagee paid the same out of his own funds, and retook possession of the estate from 1243 Fuslee. As, however, the money due to the mortgagee had not been liquidated, he, the mortgagee, made over in possession to him the estate of Nukuhra from the year 1244 Fuslee, and that ever since the mortgagee and his heirs have been in possession, and that the amount due to the mortgagee from the assets of the mortgaged estate has been repaid together with a surplus of Rs. 9,168-2-2; that for a sum of Rs. 3,000 the heirs of the mortgagee had made over to them (plaintiffs) their rights and interests possessed by them in the estate of Nukuhra, and executed a deed of sale for the same, dated 24th October 1847, whereby they had empowered them to redeem the estate, and to obtain an adjustment of the *wasildt* account; that in pursuance of this deed they had entered into possession, but owing to the opposition offered by the principals, the heirs of the mortgagee, under the orders of the Criminal and Circuit Courts, their possession was not maintained: hence they had instituted the suit.

" In their defence, Gungapershad and Gokool Dass, amongst other particulars not material to mention, plead that the mortgagees have no right without redeeming the estate from mortgage to sell the same, that plaintiffs have no means at their command, and that this suit has been instituted at the instance of Bullum Dass and Birjrumun Dass, two of the venders; that the deed itself is collusive; that plaintiffs have never been in possession; that their claim to *wasildt* from the year 1240 is barred by the law for the limitation of suits; that Gungpore Sheopore and the *wasildt* or assets of the said estate have not been sold to plaintiffs; that the statement of *wasildt* alleged by plaintiffs to be due, is not correct; that the estate of Gungpore Sheopore was never in their (defendant's) direct possession; that whatever money was collected from it and paid through the *karinda* or *tehseeldar* of the mortgager, was credited in the accounts of their *kothee* or house of business, and that Nukuhra, before its mortgage, was leased to a theekadar or farmer for the annual jumma of Rs. 2,201, agreeably to which the collections used to be made; that Baboo Sadho Lal of Benares, the mortgager, after adjustment of account, brought out a

" balance of Rs. 7,009-6-2, up to 30th Bhadon, Sumbut 1893, as
 " due from him to the mortgagee, and that a *furd hisab*, or statement
 " thereof, was drawn out by Bullum Dass at the time, which was
 " signed by him (Sadho Lall of Benares), and made over to them
 " (defendants') ancestor: that owing to the opposition offered by
 " the venders, they had to pay for the Government revenue, in
 " consequence of which the money now due to them amounts to
 " the sum of Rs. 8,399; that previous to the institution of this
 " suit, Bullum Dass and Birjrumun Dass had sent messages
 " through persons of respectability offering to pay Rs. 5,000 for
 " redeeming the estate, and asking for a remission of Rs. 2,000,
 " and some Rupees, arguing that had the amount mortgage been
 " liquidated, such messages would not have been sent.

" The other defendants did not appear.

" From the evidence adduced by the parties who have entered
 " appearances under my proceeding of the 10th January last, and
 " what they have urged in their pleadings, an abstract whereof
 " is given above, and answers to certain questions put to them by
 " pleader, as recorded in my proceeding above referred to, and
 " *jummabundee* papers of the estates of Gungpore Sheopore and
 " Nukuhra obtained from the Collector's Office at the instance of
 " the plaintiffs on special grounds, I am of opinion that the chief
 " points for determination in this case are,

" 1stly. Whether the mortgager is or is not at liberty to
 " transfer his rights and interests in estates without first redeem-
 " ing them to another.

" 2ndly. Whether the sale of mouzah Nukuhra, to plaintiffs,
 " is a *bond fide* transaction or not? in the former case, whether
 " the plaintiffs were put in direct possession of the estate or not.

" 3rdly. Whether the plaintiff's claim to *wasilat* from the year
 " 1240 Fuslee is or is not barred by the law for the limitation
 " of suits.

" 4thly. Whether any adjustment of *wasilat* account, in the
 " manner asserted by the defendants, had or had not taken place
 " on the 30th Bhadon, Sumbut 1893, between the mortgager and
 " mortgagee, as also whether the sum of Rs. 7,009-6-2 was or was
 " not due to the mortgagee at the time, as per *furd hisab*, or
 " statement of account signed by the mortgager.

" 5thly. What was the sum actually realized by the mortga-
 " gee and his heirs from the mortgaged estates during the period
 " they may have been in their possession, either direct or indirect;
 " as also what is the sum they have expended during the above
 " period for the expences of collection, &c., and the sum they may
 " have derived as profits of them, whether they had realized a
 " surplus to the extent alleged by plaintiffs over and above the
 " amount mortgage, or whether there was no such surplus, or on

" the contrary, defendants have to receive from the mortgager,
 " whose heirs are Baboo Birjrumun Dass, Baboo Bullum Dass, Hur
 " Kishen Dass and Bissashurpershad, four of the defendants,
 " in the case, a sum of Rs. 8,899, as alleged by them.

" 6thly. Whether the venders, in the manner asserted by
 " defendants, had or had not sent messages offering to pay
 " Rs. 5,000 for redeeming the estate.

" On the first point, it appears to me that proprietors of estates
 " are at liberty to alienate them whilst under mortgage: this has
 " often been ruled by the Sudder Court in their decisions, for
 " which see one No. 158 of 1845, dated 26th July 1846, wherein
 " Budn Gir, &c., are defendants, appellants, *versus* Rumjeevun, &c.,
 " plaintiffs, respondents.

" On the second, it appears to me that the sale in question is
 " a *bond fide* transaction, but it is doubtful whether plaintiffs were
 " ever put in possession, though there can be none as to their
 " attempting to dispossess the heirs of the mortgagee out of the
 " collections of mouzah Nukuhra, whose possession was main-
 " tained by the foudaree and Circuit Courts.

" On the third, it appears to me that the plaintiff's claim to
 " *wasildt*, if due, is not barred by the limitation laws; it being a
 " case of mortgage.

" On the fourth, the evidence adduced by the defendants is
 " so clear as to leave no room to doubt that such adjustment had
 " taken place, and that a sum of Rs. 7,009-6-2 was due to the
 " mortgagee at the time. Had this not been the case, the mort-
 " gager would not have made over to the mortgagee mouzah
 " Nukuhra in lieu of Gungpore Sheopore, that is, in the year
 " 1244 Fuslee, for the liquidation of Rs. 7,009-6-2 then due.

" On the fifth, it appears to me that plaintiffs are only purchas-
 " ers of mouzah Nukuhra with all its liabilities, from which estate
 " it does not appear that the mortgagee and his heirs have realis-
 " ed sufficient to cover the amount mortgage due, and the sum
 " incurred by them for the payment of the Government revenue,
 " &c., fully detailed in a statement filed by them under the signature
 " of Bissashurdial, their *gomashita*, shewing the sums received and
 " expended from the year 1244 to 1255 Fuslee, from the estate of
 " Nukuhra, and substantiated on oath, as now administered, by the
 " *gomashita*, and by the evidence of other witnesses. On the
 " contrary, it would appear that the heirs of the mortgagees have
 " yet to realize a sum of Rs. 8,899, due to them.

" On the 6th, it does not appear to me clear that any such
 " messages, as the defendants assert, had been made."

" Taking the above view of the case, the plaintiff's claim is not
 " tenable. Ordered, therefore, that it be dismissed, and costs of suit
 " be made payable by them."

The points to be tried in appeal are: 1stly, the genuineness of the *furd hisab*, which purports to exhibit, under an adjustment effected in September 1836, a balance in favor of the mortgagees, amounting to Rs. 7,009-6-2; and 2ndly, the trustworthiness of the accounts of their receipts and expenditures as put into Court, and sworn to by the mortgagees.

There is no ground for calling in question the genuineness of the document first referred to. It is true that on the occasion of the transfer to the mortgagee, in October 1836, of mouzah Nukuhra, under the terms of the mortgage contract, the excess due to the mortgagees over and above the sum originally advanced by them is not stated in the application to the Collector, but there is nothing unusual in that circumstance, as the object was simply to obtain a substitution of names in the Collector's books; if, however, any doubts might reasonably be founded on the omission, they are set at rest by the fact, that in the following year (1837), on a decree being passed against the mortgager in favor of a third party, the disputed document, was filed in Court on the *oozurduree* of the mortgagee, and admitted to be correct.

As regards the second point, the mortgagees have complied with the provisions of Section 11, Regulation XV. of 1798, by putting into Court's statements of their receipts and disbursements for each year from 1244 to 1255 Fuslee: to these statements the appellant objects in general terms only, without pointing out their inaccuracy in any specific instance; he pleads, indeed, that the putwarrees' *nikasees* for the whole period have not been filed, but those papers, while they have been declared by precedents of this Court to afford a valuable test of the correctness of accounts, such as those now treated of, are not indispensably necessary, when, as on the present occasion, the details supplied by the mortgagee fully enable the Court to proceed to an adjustment.

The appeal is dismissed, with all costs of suit.



The 30th January, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 32 OF 1851. { *Special appeal from the decision of Moul-
vee Mohamed Hoossein Khan, Principal
Sudder Ameen of Mynpoorie, dated 26th
July 1850.*

OODEYRAJ, (*Defendant*), *Appellant*,

versus

JUMEYUT RAI AND OTHERS, (*Plaintiffs*), *Respondents*.

THE papers in this case have not been drawn up with that attention to perspicuity which is essential to judicial proceedings, nor were the vakeels of the parties able to supply the defects of the record. The settlement map is not in the *misl*, but there are several others which differ so much that it is difficult to believe that they represent the same ground. However, it appears that the parties are the zemindars of the adjacent villages of Brijnathpore and Koralee, and that the suit has arisen out of a boundary dispute, Jumeyut Rai claiming the land as belonging to qusbeh Koralee, and Ooderaj claiming under the settlement.

The disputed ground consists of two parcels, one called "Gondah" upon which several trees are growing, and another upon which a *chubootra* has been built. These were included at the settlement within the boundaries of Kusbatee Tolah, which plaintiff asserts to be a *mohullah* of qusbeh Koralee, but which has been settled with the defendant, whether as a separate mouzah, or as part of mouzah Brijnathpore does not clearly appear.

The Moonsiff, considering the proof of the plaintiffs' right to be unsatisfactory, and observing that the settlement had been made with the defendant, dismissed the claim.

The Principal Sudder Ameen, in appeal, finds, that the disputed parcels of land are in Kusbatee Tolah, which tract was settled with the defendant, and he proceeds to give a decree to the plaintiff, reserving the proprietary right in the land to the defendant. If the Principal Sudder Ameen by this intends to award to the plaintiff only the trees themselves and the *chubootra* itself, then it appears to the Court that the decree has given that which the plaintiff did not claim, and the special appeal was admitted upon this ground.

From the nature of the two parcels, one being, as it is described, part of a ditch, and the other built upon, and both apparently

in a town, it is very possible that the *zemindaree* right cannot be readily discriminated from those of the parties who had planted the trees, or laid down the *chubootra*. This would only render it the more necessary that decrees of Court in regard to such ground should be definite and distinct beyond the power of questioning. If this suit really be, as the Court, after perusing the plaint and hearing the vakeel, considers it to be a boundary dispute, the Principal Sudder Ameen could not award the ownership of trees and bricks to one party, whilst he left the *zemindaree* right with the other. Such a decree would be inconsistent with the plaint.

The decree of the Court below is therefore annulled, and the case remanded to the file of the Principal Sudder Ameen, who will record a fresh decision.



The 3rd February, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 160 OF 1850. { *Special appeal from the decision of*
J. S. Boldero, Esq., Judge of Agra,
dated 30th April 1850.

HEERA LALL, (*Plaintiff*), *Appellant,*

versus

RUTCHPAL, (*Defendant*), *Respondent.*

A NOTICE of this case will be found in the printed decisions of the Zillah Courts for April 1850.

The owner of certain landed property mortgaged it, under peculiar conditions, to the plaintiff in this suit, and subsequently sold it to the defendant.

The plaintiff sued in the Sudder Ameen's Court to set aside the deed of sale, with reference to the express terms of his mortgage contract. The Sudder Ameen decreed in his favor.

The Judge overruled the decision of the Court below, holding, so far as this Court comprehend the judgment which he has passed, that the case is not taken out of the ordinary rules relating to such transactions, and that the owner of the property might, as of course, first mortgage it, and then sell it while under mortgage.

A special appeal was admitted to determine, whether the Judge has not erroneously overruled the decision of the Court of first instance, which had laid it down that the mortgager was not at liberty to alienate by sale the property mortgaged to the plaintiff, in direct violation of the terms of the contract of mortgage.

The Court cannot uphold the Judge's decision. Under ordinary circumstances, the right of a proprietor to sell to one party property which he has previously mortgaged to another is not matter of question. But the Court find, on referring to the mortgage deed in this case, an express stipulation by the mortgager that during a period specified he will not sell it. He has sold it notwithstanding, and for this violation of the engagement entered into the plaintiff is entitled to call on the Courts for redress.

The decision of the Judge is annulled, and the decree passed by the Sudder Ameen in the plaintiff's favor is affirmed.

The 3rd February, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 165 OF 1850. { *Special appeal from the decision of
Mohumed Luteef Khan, Principal
Sudder Ameen of Goruckpore, dated
29th April 1849.*

GOMANEE LALL, (*Plaintiff*), *Appellant,*
versus

GOORDIAL AND SEETA RAM, (*Defendants*), *Respondents.*

THE plaintiff instituted an action in the Court of the Sudder Ameen of Goruckpore for the purpose of bringing to sale a dwelling house, the property of Seeta Ram and others, and for reversal of a collusive decree which Goordial had obtained against Seeta Ram.

It appears that the Moonsiff of Ghazeepore, on a money claim brought by Gomanee Lall against Seeta Ram, passed an order on the 3rd January 1849, directing that the defendant furnish the required legal security, or, in default thereof, that his property be attached. Upon this, Goordial brought an action for money against Seeta Ram, and, having obtained a decree, brought to sale in satisfaction of it a dwelling house in the Goruckpore district, the property of Seeta Ram. The prescribed legal security not having been given, the same house was attached on the 11th May 1849, in pursuance of the order passed by the Moonsiff of Ghazeepore in the suit in which Gomanee Lall was plaintiff. Gomanee Lall then brought the present action, with the object abovementioned.

The Sudder Ameen passed a judgment in favor of the plaintiff. The Appellate Court, holding that the decree obtained by Goordial was not collusive, and that the house was liable to sale in satisfaction of the decree of Goordial, as not then under attachment, reversed the Sudder Ameen's decision.

A special appeal was granted to try, whether the Principal Sudder Ameen has not acted in opposition to judicial usage in fixing, in the present case, the 11th May 1849 as the date on which the property of the defendants was attached under Regulation II of 1806, instead of the 3rd January 1849, which is the date of the order for attachment passed by the Ghazeepore Court.

The Court hold that there is no irregularity in the Principal Sudder Ameen's proceedings. The disputed property was not

The appeal is therefore dismissed.

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CASE No. 184 of 1850.

versus

DOONGUR MULL AND OTHERS, (*Plaintiffs*), Respondents.

The plaintiffs again brought suit in 1847, not, however, for the recovery of rent, but to establish a proprietary title to the house. The Court of first instance dismissed the claim, on the ground that the plaintiffs had been out of possession for more than twelve years. The Principal Sudder Ameen, in appeal, reversed that decision.

The judgment of the Principal Sudder Ameen is manifestly wrong. He has misunderstood the purport of Section 18, Clause 3, Regulation II. of 1803. It was ruled by the Court in 1843, that for eleven years previously to that year, the plaintiffs had derived no rent from the house, and were possessed of no title to levy it. It cannot be that the plaintiffs should be found, under the

judgment in 1848, to have been out of possession since 1882, and at the same time be found, under the judgment now passed, not to have been out of possession since that period. The facts established formerly are inconsistent with the facts established now.

The decision of the Principal Sudder Ameen is accordingly reversed, and the claim of the plaintiffs dismissed.

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The 3rd February, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. LUSHINGTON, }
 { H. W. DEANE, Offg. Judge.

CASE No. 193 OF 1848. { Regular appeal from the decision of
 Moulvee Mohumed Sulleem Khan
 Buhadur, Additional Principal Sudder
 Ameen of Ghazee-pore, dated 29th
 August 1848.

BABOO RAMPURSHUN SINGH, (*Plaintiff*), *Appellant*,
 versus

MUSSUMAT DEO KOONWUR AND KAMPTA PERSHAD, (*Defendants*),
 Respondents.

THE plaintiff sued to recover possession of talooqua Urjin Mull, with *wasildt*, estimating his suit at Rs. 18,078-8. He stated that the estate in question had been purchased by his grandfather, Baboo Deokeenundun Singh, in the name of Jankee Pershad, the plaintiff's father, and that Deokeenundun had settled the property for life on his illegitimate son Ishree Pershad, who died in 1253 Fuzlee. The name of Jankee Pershad has all along been registered as the proprietor, and on Ishree Pershad's death, the estate reverted to plaintiff and his nephews; but the defendant, Mussumat Deo Koonwur, widow of Ishree Pershad, refused to surrender possession, the other defendant, Kampta Pershad, was merely a *karinda* originally appointed to superintend the estate by plaintiff, but now colluding with Mussumat Deo Koonwur.

The defendant, Mussumat Deo Koonwur, in reply, asserted, that the estate had been bestowed on her husband by Deokeenundun in *perpetuity*! and that she, as his widow, had succeeded to the property, and she produced a deed of gift purporting to be from Deokeenundun in favor of Ishree Pershad, bearing date 16th February 1810. This deed was declared by the plaintiff to be a forgery.

The Principal Sudder Ameen considered the deed to be genuine, and dismissed the plaintiff's claim.

The Court are unanimously of opinion that the deed produced by the defendant is spurious. The appearance of the ink, the paper, and the cloth, pasted on its back, indicates that the deed has been recently prepared, although purporting to have been executed forty-one years ago, it has never before been presented in any Court, notwithstanding there have been Civil suits between the parties prior to the institution of the present suit. In a summary suit instituted by Mussumat Deo Koonwur in April 1847, allusion is indeed made to this deed, but it was not produced. In his petition of plaint, in a suit instituted by Ishree Pershad, on the 16th September 1844, he makes mention of a *hibbehnamah* executed in his favor by his brother Jankee Pershad, a description of his title deed not agreeing with the document now filed, which is a *putr from the father of Jankee Pershad*. The facts of Jankee Pershad's name being all along registered in the Collector's books, and the omission of Ishree Pershad to apply for an acknowledgment of his own absolute property in the estate, are quite incompatible with the supposition that the talooqua had been permanently alienated in his favor by Deokeenundun.

The Court accordingly reverse the decision of the Principal Sudder Ameen, and decree in favor of the plaintiff's claim.

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The 3rd February, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 212 OF 1850. { Special appeal from the decision of
R. J. Tayler, Esq., Judge of Jounpore,
dated 16th May 1850.

JINGREE SINGH, (*Defendant*), *Appellant*,
versus

THE RAJAH OF BENARES, (*Plaintiff*), *Respondent*.

THE particulars of this case are given in the printed decisions of the Zillah Courts for May 1850, page 51.

A special appeal was granted to try, whether it was competent to the Judge, under the circumstances of this case, to decree to the plaintiff a title to levy enhanced rent.

The Court are of opinion that the point at issue in this case has not been tried by the Judge. The defendant, on suit brought by the plaintiff to recover an enhanced rent on certain land in

the defendant's cultivation, pleaded a title to pay for the land at privileged rates. In support of this plea, he referred to a decision of the Civil Court passed in 1836, when he was sued by one Kerodur Lall, in whose place the plaintiff now stands. He further cited an order of the Collector passed in his favor in 1842. The Judge has overlooked this important plea, and, treating the case of the defendant mainly as that of an ordinary *ryot*, has declared the plaintiff entitled to levy enhanced rent by reason of his having duly served on the defendant the notice prescribed by Regulation V. of 1812. The Judge observes, indeed, that the plaintiff was not a party to the suit brought by Kerodur Lall, but that argument is not, in the Court's opinion, of force, the sole question being whether, as pleaded, the defendant be a privileged rent payer or not.

This material defect in the finding of the Judge renders it necessary that the suit be remanded to his file for retrial, and it is remanded accordingly.

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The 3rd February, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 258 OF 1850. { *Special appeal from the decision of*
S. S. Brown, Esq., Judge of Goruck-
pore, dated 8th November 1849.

RAM PERSHAD SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

THE COLLECTOR OF GORUCKPORE, (*Defendant*), *Respondent*.

THE printed decisions of the Zillah Courts for November 1849, page 229, contain full particulars of this case.

It appears from the records that certain waste lands were separated off by the Revenue Authorities in 1833, from tuppeh Keotullee, in Zillah Goruckpore, and made over by the Government to lessees on rent-free terms for a fixed period. The plaintiffs subsequently obtained a decree, in 1837, in the Civil Courts, not against the Government, but other parties, for a proprietary title in the tuppeh and waste lands inclusive. They now claim, by suit brought 6th June 1848, *malikana* under the terms of Section 8, Regulation VII of 1822, dating their cause of action from 1838, in which year the Government first derived revenue from the waste tract.

The Principal Sudder Ameen held that the suit is not barred by lapse of time, and that the cause of action is correctly assum-

ed to be the realization, in 1838, of Government Revenue, but he dismissed the claim on other grounds.

The Judge, in appeal, dismissed the claim with reference to the law of limitations only.

A special appeal was allowed to try, whether the suit is barred by the statute of limitations.

It is argued by the vakeel of the respondent that the right of the plaintiffs was denied by the Government in 1833, and that, consequently, the cause of action must be thrown back to that date. The Court hold that this plea is not sustainable. The disputes which took place in 1833 did not take place in regard to the right of the proprietors to *malikana* on land appropriated under Section 8, but in regard to the inclusion in the grant of particular lands which the proprietors asserted to be not at the disposal of Government under the law above quoted. A correspondence has been put into Court by the vakeel of the respondent, but how a construction can be put on it, auxiliary to the respondent's case, the Court have some difficulty in conceiving. In their view, it eminently favors the claim of the appellants. The first letter is one from the Secretary to Government to the Secretary to the Board of Revenue, No. 814 of 1833, dated the 15th March 1833. In the 5th paragraph of this letter are the following words. "Any just claim which the Rajah of Suttasee, or other person, may be considered to have to *malikana* under Section 8, Regulation VII of 1822, on the jumma ultimately payable by the grantee; will of course be brought to the notice of the Government in the usual manner. Where no right of property may be held to be established, the claimant has the option of bringing forward his alleged right in the Civil Courts." The next letter is one from the Secretary to the Board of Revenue, No. 89 of 1833, dated 2nd April 1833, conveying to the Commissioner of Goruckpore the orders contained in the letter first quoted. The third letter is from the Commissioner of Goruckpore, dated 9th April 1833, to the Sudder Board of Revenue. The Commissioner remarks in his third paragraph—"in the orders of Government of the 26th July 1831, on an application for a grant of land on the part of Mr. Maclachlan, His Honor the Vice-President in Council was pleased to sanction the same, on the understanding that the lands in question were *bond fide* waste, and not included within the limits of any known mehal, but were the undoubted property of Government, and that the only right in them could be founded on a grant from Government; and on the 19th June 1832, a second application for a further grant to Mr. Maclachlan, and for an additional grant to Mr. Matthews, were rejected in consequence of a deviation from the above principles in the recommendations forwarded by the Collector." In his fourth para-

graph, the Commissioner writes, "I was therefore induced to suppose that Government were not inclined to interfere in any way with private rights, and that they would only sanction such grants as were clearly shown not to compromise such rights." The Commissioner goes on to write in the sixth paragraph of the same letter, "in the case in point I understood that Baboo Juggut Singh and others, (admitted by the vakeel of the respondent to be identical with the plaintiffs in this case), were the recorded zemindars of the settled villages, and had such a claim to the zemindaree rights of the remainder of the villages in tuppeh Keotullee as would have ensured their recognition as proprietors either before the Collector or in a Court of Justice. They stated their readiness to engage direct with Government for this estate, on any terms which might be demanded from them, and they urged their preferable right to be allowed to do so to that of a stranger. Under these circumstances, I recommended that tuppeh Keotullee should be excluded from the grant in question, and I meant of course that it should be settled with them." There is nothing in the above which can be interpreted into a repudiation of the right of the plaintiffs; on the contrary, it clearly leaves them at liberty to sue for *malikana* under the provisions of Section 8, Regulation VII of 1822, whenever they may deem it proper to do so. The Court have no hesitation in declaring that no act, adverse to the claim of the plaintiffs, has been shown to have been done by the Government at any time prior to twelve years before the institution of the suit. Consequently, the claim is not barred by lapse of time, and it is hereby remanded to the Judge's file, in order that it be disposed of on its merits.

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The 4th February, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 209 OF 1849. { *Regular appeal from the decision of Mr. J. Campier, Principal Sudder Ameen of Mirzapore, dated 26th July 1849.*

GOBIND RAM AND GIRDEH DASS, (*Plaintiffs*), *Appellants*,
versus

BALMOOKUND, AUCTION PURCHASER, BRIJBULLUB DASS AND
BRIJRUWUN DASS, (*Defendants*), *Respondents*.

THE plaintiff claims to establish his possession of mouzah Jungle Mehal, &c., in virtue of a deed of sale, dated 9th January 1843, said to have been executed in his favor by the defendants Brijbullub Dass and Brijruwun Dass, and to exclude the auction purchaser Balmookund.

The plaintiff maintains that on the 9th of January 1843 the defendants, Brijbullub and Brijruwun Dass, sold the mousah to him, received payment, and delivered possession: that although the usual mutation of names in the Collector's books was prevented on one occasion by the objections of Baboo Jankee Dass, and on another by Niamut Beebee, they nevertheless continued to exercise all the rights of proprietors in the land which they had purchased: that during the *moostajiree* of Dwarka Dass, they retained possession of the *sayer*: that the village was subsequently sold at auction in satisfaction of a decree held by Niamut Beebee against the original owners Brijbullub and Brijruwun Dass, and purchased by the defendant Balmookund: that the Revenue Authorities, in spite of plaintiff's remonstrances, put Balmookund in possession of the village, and that an appeal to the Civil Court has thus become unavoidable.

The defendant, Balmookund, after advancing some technical objections, pronounces the alleged deed of sale to be collusive: he denies that any purchase money was ever paid, and asserts that the plaintiffs have never been in possession.

The other defendants did not appear.

The Principal Sudder Ameen records his opinion on the main point at issue in the following terms.

"It appears there are no less than eight witnesses, including the writer, who have subscribed their names as witnesses to the deed of sale. The plaintiffs, however, have produced only two in this Court, whose evidence is not sufficient to prove the same; had he produced the others, a searching examination would have been made from them respecting the same. In the absence thereof, and from what other witnesses have deposed, there is every ground to apprehend that the deed in question is not genuine and executed with good faith. On the contrary, it is evident, as may be gathered from the features of the case, and what the witnesses of the defendants have deposed, that it was executed with the object of defeating the execution of the decree of Niamut Beebee. This being the case, the deed in question cannot but be considered in a collusive light."

The deed is *genuine*, but the Court agrees with the Principal Sudder Ameen in thinking that it was not executed in good faith. There are several very suspicious circumstances connected with the deed besides those noticed in the decree of the lower Court. Niamut Beebee's decree, in satisfaction of which the auction sale to Balmookund took place, is dated 25th February 1841, two years before the execution of the alleged deed of sale: and if, as plaintiff states in his appeal, the amount of Niamut Beebee's decree was so small, it would have been easy, as well as honest; to pay it from the proceeds of the sale to the plaintiffs.

The deed is dated 9th January 1843, and it was not registered till the 11th March following. A circumstance of no great weight by itself, but deserving of notice when considered in conjunction with the rest of the case. The defendant explains the delay by declaring that the deed was antedated, and he adduces a strong argument in support of his declaration. The signature of Ramsurn, putwarree, is attached to the deed as one of the witnesses to the execution in Benares, whereas there is with the *misal* the report of the Nazir of the settlement office, dated 9th January 1843, stating that Ramsurn was then in attendance at the settlement cutcherry in Ahrorah, a town said to be from one to two days journey distant from Benares. Of this circumstance no explanation was offered by the plaintiff, appellant.

The settlement of mouzah Jungle Mehal took place subsequently to the alleged execution of the deed, the *wajib-ul-urz* having been given in on the 13th January 1843. The *furd putteedaree* was drawn out in the names of the sellers Brijbullub and Brijruwun Dass, and other steps in the settlement were taken, all being subsequent to the 9th January 1843, yet, throughout the whole proceedings, not one word is to be found in regard to the sale of the whole village, which, according to the plaintiffs, had taken place only a few days before. If the sale had really taken place as described, and had been a *bond fide* transaction, the Court is satisfied that some mention of it would be found in the settlement proceedings.

In explanation of the absence of six out of eight witnesses, whose names are on the deed, the plaintiff, appellant, states, that two have been gained over by the respondent, and that subpoenas were issued for the remaining four. This is hardly satisfactory, and the respondent, in commenting upon the explanation, observes, that as regards the two, appellant has given a very bad reason for their absence, and, as regards the four, no reason at all.

The appellant finally complains that the Principal Sudder Ameen has taken no notice of his twenty-two documents. On examination, it appears that seven are copies of depositions taken in the miscellaneous department; five are receipts for payment of revenue given to the sellers, not to plaintiff; two are the *qabala* and receipt upon which the present suit is founded; and the rest are *roobakarees*, petitions for *dakhil kharij*, and a *jumma khurch* of the disputed village. These are not documents which require more notice than the Principal Sudder Ameen has taken of them, most of them not bearing upon the issue, or proving that which is not denied by the opposite party.

Under these circumstances, the Court dismisses the appeal, and upholds the decision of the Court below.

The 5th February, 1851.

Present: H. W. DEANE, Offg. Judge.

CASE No. 20 OF 1851. { *Regular appeal from the decision of
Abdool Azeez Khan, Principal
Sudder Ameen of Goruckpore,
dated 24th October 1849.*

PURMESUR DUTT DOOBE, (*Plaintiff*), *Appellant*,

versus

RANEE INDERBASS KOOREE, (MOTHER AND GUARDIAN OF RAJAH
OODENABAIN MULL, A MINOR,) AND OMER SHUNKER,
surburakar, (Defendants), Respondents.

THE plaintiff sued in the lower Court to recover a sum of Rs. 5,000, with interest amounting to Rs. 5,000 more, on a bond asserted to have been executed in his favor in the month of Koar 1244 Fuslee, on a date corresponding with the 22nd October 1836.

The substance of the plaint is, that the plaintiff and his father having long had money dealings with the defendant, the accounts between them were adjusted, and a bond executed on the date abovementioned, for the payment of Rs. 5,000. The estate of the defendant was placed under the management of the Court of Wards, and on the 4th May 1837, the plaintiff represented to the Collector the existence of this debt; the then surburakar, however, Simboo Nath, denied that any money was due to the plaintiff, and the Collector, on the 20th November 1837, disallowed the plaintiff's title to be recognized as creditor; whereupon, in 1848, or eleven years afterwards, the plaintiff comes into Court for the recovery of the sum due to him, with interest.

On the part of the defence, it is urged, that the bond before the Court was not executed by the defendant Ranee Inderbass Kooree, and that no money was advanced by the plaintiff. It is admitted that Dooleen Soondur Buksh Kooree, the mother of Tej Mull, the Ranee's late husband, gave the plaintiff a bond in the name of the plaintiff's son, for which, however, no consideration was at any time received. It is pleaded that on a petition to the Collector by the surburakar, on the 4th July 1837, praying that the plaintiff's father be sent for and examined on the subject of this bond, the plaintiff's father absented himself on various pretexts, and at length the Collector, in November 1837 formally disallowed the claim, and it is contended that if the plaintiff had been possessed of any rightful title to recover, he

would not, after this refusal by the Collector, have suffered so long a period to elapse without preferring his claim in a Court of law.

The Principal Sudder Ameen, in what appears to me to be a very satisfactory payment, dismissed the plaintiff's suit. He comments at some length on the internal evidence that the bond is not genuine. It purports to be drawn out, he observes, at Mejowlee, the place of residence of the Ranee, yet nevertheless, the persons attesting it are none of them inhabitants of that place, or in any way connected with the Ranee's affairs: the writer of the bond is unknown: of the four attesting witnesses, one of them, Toola Ram, is dead, and the three others, upon their own showing, met by mere accident at Mejowlee, and were invited by the Ranee, who knew little or nothing of them, to verify a bond for a large sum of money: the witness Ram Buksh Singh resides sixteen *koss* from Mejowlee, another witness, Seetul Dan Singh, twenty-four *koss* from it: but besides all this, it is proved (the Principal Sudder Ameen continues) that on the 24th September 1836, Ram Buksh Singh was sent by the Police Officers to the Magistrate of Goruckpore on a criminal charge, in company with Seetul Dan Singh, as a witness in the said criminal matter; that on the 4th October 1836, Ram Buksh Singh was ordered to find security for his appearance at the Magistrate's Court, which order was not complied with until the 20th October; it is most improbable, therefore, that he should have been present at Mejowlee, twenty-four *koss* from Goruckpore, on the 22nd, attesting a bond between parties with whose affairs he had nothing to do. Moreover, that plaintiff himself is shown to have been summoned by the Magistrate on a *hookumnamah* of 21st October 1836, and to have been reported present by the nazir on the 24th; as little likely is it, therefore, that the plaintiff's account should be true, as that of the witness abovenamed, since, in order to believe it, it becomes necessary to suppose that the plaintiff was at Mejowlee on the 22nd, at his own home, three marches off, the day after, and on the 24th at Goruckpore, distant ten or twelve *koss*. The Principal Sudder Ameen further remarks on the fact that when the surburakar, Simboo Nath, made out a list of creditors, and explained to the Collector that the mother-in-law of the Ranee had really executed a bond but had received no money in consideration of it, the party holding the bond, on being summoned, did not attend, but absconded; and it is pointed out by the lower Court, in conclusion, that there is a manifest want of congruity between the Ranee's seal and hand-writing on other papers, and the seal and hand-writing on the bond presented on this occasion.

The arguments put forward in appeal are weak in the extreme. It is urged, that as the defendant admits that a bond was executed

by her mother-in-law, the receipt of the money must be taken for granted. The answer is, that the bond before the Court is not admitted by the defendant, her admission referring to a bond written by another person, for which no money was received. It is said likewise, that the presence of the attesting witnesses, at Mejawlee, on the 22nd October, was not, even on the assumption that all which has been advanced by the Principal Sudder Ameen is correct, physically impossible; and that when a bond has been duly proved in evidence, as this has been, the party claiming upon it is entitled to a decree. To reasoning of this sort it is enough to reply that the point at which rational credulity stops lies far short of the preternatural, and that we justly refuse our assent to relations of which no more can be said than that they are extravagantly improbable; and that it is because the Principal Sudder Ameen considered the bond to be *not* duly proved in evidence, and had it in his power to assign reasons of weight for discrediting the testimony tendered to him, that he rejected the claim. I dismiss the appeal, with all costs.

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The 5th February, 1851.

Present : H. LUSHINGTON, Judge.

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CASE No. 252 OF 1849. { *Regular appeal from the decision of Qazie Yar Ali Khan, Principal Sudder Ameen of Jounpore, dated 22nd October 1849.*

SHEO GHOLAM SINGH, (*Plaintiff*), *Appellant*,
versus

HAJEE IMAM BUKSH, (*Defendant*), *Respondent*.

THE plaintiff claims to obtain possession of half of talooqua Sunohee, by *redemption of the mortgage* held by the defendant.

The plaintiff states that the defendant holds the disputed half of talooqua Sunohee under a deed of conditional sale, or mortgage, executed in his, defendant's, favor, by the original proprietors Ramsurn Singh and others; but he, plaintiff, has now purchased at auction the rights and interest of the owners of the mortgaged property, and, as a legal representative of the mortgagers, claims to redeem the mortgage.

The defendant replies that the deed under which he holds, dated 27th December 1826, is not a deed of mortgage or conditional sale, but one which conveys to him the whole rights of the original proprietors.

The whole case therefore rests on the construction of the deed. The Principal Sudder Ameen was of opinion that there was nothing in the deed, (neither *lufz*, *ibarat*, nor *zitr*) to support the supposition that it was a mortgage, but that, on the contrary, the sale was clearly absolute. He therefore dismisses the claim, and the plaintiff appeals to this Court.

The deed in question is neither a deed of mortgage nor a deed of absolute sale, as these terms are usually understood, it is a deed of agreement, or preliminary arrangement, which, according to circumstances, was either to be followed by a deed of absolute sale, or to become itself the evidence of an absolute sale. The sellers were engaged in law proceedings in regard to this property at the time when they executed the deed, and though they transferred their estate to the purchaser, Ibadoollah, from whom the defendant, Imam Buksh, derives his title, yet it is clear that the execution of another deed was in contemplation, hence the plea of the appellant, which is no more than that since the deed on which the suit is founded confessedly did not evidence a complete transfer, it must be regarded as a *bye-bil-wuffa*, subject to all the laws applicable to that class of deeds.

The document itself is to the following effect. "We Ramsurn Singh and others, proprietors of one-half of talooqua Sunohee, have sold the one-half aforesaid to Ibadoollah for Rs. 1,001, and Rs. 200, to be paid annually by the purchaser, have been fixed for our maintenance, after the auction sale shall have been reversed, and a decree obtained, and possession given to the purchaser, we are to receive this sum every year; we declare that the said purchaser is to consider himself proprietor of half of talooqua Sunohee in virtue of this deed, and is to enjoy all the rights of zemindar and malgoozar as soon as the decree shall have been obtained. The purchaser will pay the Rs. 200 from whatever source he pleases, (*ez hurja ki daunud*), and we relinquish all claim on the part of ourselves and our heirs.

"We further declare that, as soon as the decree has been obtained, we will execute an absolute deed of sale in favor of the purchaser, and if we fail to execute such a deed, then, since the whole of the purchase money has been paid, the present document shall be held to be a deed of absolute sale.

"Accordingly, we have executed this deed as an '*ikrarnameh sutta bye*' of half of talooqua Sunohee."

It is admitted that the decree, several times referred to, was obtained, and that all the conditions of the deed were fulfilled. It remained therefore for the sellers to execute a deed of absolute sale, in default of which the '*ikrarnameh sutta*' *bye* became itself a deed of absolute sale. There is no ambiguity in the language of the deed, nor is there any doubt as to the intention

of the sellers, and the Court therefore fully agrees with the Principal Sudder Ameen in rejecting the plaintiff's claim. Whatever the deed may be, and whatever rights it may convey to either of the parties, it certainly is *not* a deed of mortgage: and though there are conditions attached to the sale, it is quite clear that they are not conditions of that nature which can bring the transaction within the law applicable to ordinary deeds of *bye-bil-wuffa*.

The Court accordingly dismisses the appeal, and confirms the decision of the Court below.

The 10th February, 1851.

Present: { B. TAYLER,
A. W. BEGBIE, } Judges,
H. W. DEANE, Offg. Judge.

CASE No. 1 OF 1851. { Special appeal from the decision of
Rai Doobé Jowala Pershad, Additional
Principal Sudder Ameen of Azingurh,
dated 8th June 1850.

AMROODH SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

SALIK RAI, (*Plaintiff*), *Respondent*.

THIS suit was brought for the recovery of a one-anna share in the village of Sadeepore, tuppa Bela, pergunnah Nizamabad. The Moonsiff dismissed the claim under Clause 1, Section 9, Regulation VII of 1822, on the ground that the settlement had been made with the proprietors "*beegah dam*", and therefore the suit was improperly brought. The Principal Sudder Ameen reversed the decree, considering that the village, prior to the settlement, had been held in *putteedaree* tenure, and that by the terms of the *wajib-ul-urz* the proprietors might, if they agreed amongst themselves, revert to that tenure.

A special appeal was granted to determine, whether the village having been at the time of settlement made with the proprietors under the denomination "*beegah dam*", the suit should not be dismissed.

The Principal Sudder Ameen finds that the settlement was made with the proprietors in the mode asserted by the plaintiffs. As the suit is not brought to set aside the settlement, the Court are of opinion that the settlement must be upheld until altered by the revenue authorities, with the consent of all parties, or the

settlement be annulled by a Court of law: they therefore reverse the decision of the Principal Sudder Ameen, and uphold that of the Moonsiff's.

The 10th February, 1851.

Present: { B. TAYLER,
A. W. BEGBIE, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 8 OF 1851. { *Special appeal from the decision of*
G. F. Harvey, Esquire, Judge of Cawn-
pore, dated 5th August 1850.
NOOR AHMUD AND OTHERS, *Appellants,*

versus

SHURUF-OOOLNISSA AND OTHERS, *Respondents.*

THIS suit was brought to obtain possession of a 12-anna share under a deed of mortgage, dated 17th September 1830. The particulars of the case will be found in the printed decisions of August, case No. 271 of 1849. The Judge decreed in favor of plaintiff. A special appeal was granted to determine, whether the suit had been instituted within the period required by the statute of limitation; and 2ndly, whether the estate having been sold for arrears of revenue subsequent to the conditional sale, the plaintiff could bring a suit for possession.

The Court observe that on the 4th August 1845, in the case of Khame Chund and Kishen Chund, appellants, *versus* Zeeo-ooddeen, respondent, it was ruled that "the mortgagee who is out of possession must bring his suit within the period ordinarily prescribed by law in order to establish the validity of the document under which he claims possession." The precedent is strictly applicable to the present case; as the suit has been instituted seventeen years after the date of the mortgage deed, the Court reverse the decision of both Courts, and decree the appeal. The Court having disposed of the suit on the first point of special appeal consider it unnecessary to pass any judgment on the second point.

The 10th February, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 140 OF 1850. { *Regular appeal from the decision of*
Moulvee Syed Mohumed Villayet Ali
Khan, Principal Sudder Ameen of
Allahabad, dated 11th June 1850.

GOSHAIN MANPOOREE, (*Plaintiff*), *Appellant,*

versus

PURBHOO DASS AND LUCHMEE NARAIN, (*Defendants*), *Respondents.*

THE suit was brought to set aside a sale of certain property, made by the defendant Luchmee Narain in favor of the defendant Purbhoo Dass, in order that the said property might be brought to public sale in satisfaction of a decree held by the plaintiff, Goshain Manpooree, against Luchmee Narain.

The firm of Suggoo Mull, now represented by Luchmee Narain, became insolvent on or about the 1st March 1847. The plaintiff immediately sued in the Mirzapore Court for a debt due to him by the firm, and applied for the attachment of a *bagh* and certain buildings belonging thereto, situated in zillah Allahabad, that is to say, the property now disputed. The Court gave all the assistance it could to the plaintiff, for it ordered that the security, in default of which the attachment would take place, to be furnished in *one* day. The defendant, however, was too quick for him, and by great exertions succeeded in effecting a transfer of the property to Purbhoo Dass for Rs. 15,000; the deed of sale, which was duly registered, bears date 30th March 1847, that is, on the fourth day after the issue of the order for security and attachment by the Mirzapore Court, and there can be no doubt that the object of the transfer was to prevent the attachment.

The plaintiff obtained a decree against Luchmee Narain on the 25th June 1847, and immediately endeavored to bring this property to sale. Purbhoo Dass appeared as objector, and by a series of acts, or tricks, which appear to have been most adroitly managed, he succeeded in preventing new sales, or nullifying old ones, until, on the 31st January 1848, he obtained a decree upon his deed of sale for the property which Goshain Manpooree was endeavoring to put up to auction. The objection of Purbhoo Dass being now supported by a decree of Court could no longer be opposed, and Goshain Manpooree had recourse to the present action.

The principle pleas of the plaintiff are, that the transfer to Purbhoo Dass was invalid on account of the attachment under Section 5, Regulation II. of 1806, and if not on that account, then on account of the collusion, which was evidently practised by the defendants to the great injury of plaintiff.

The Principal Sudder Ameen shows very clearly in his decision, that the attachment under Regulation II. of 1806 had not taken effect previously to the execution of the deed of sale, on the 30th March 1847. The question of collusion remained. In regard to this he observes, that the purchase money, amounting to Rs. 15,000, was not paid to the insolvent sellers, but to their creditors, six of whom compromised their claims for seven, eight, or nine annas in the rupee, and gave to Purbhoo Dass the several receipts which are to be found in the *misal* of the case, Purbhoo Dass *versus* Luchmee Narain decided 31st January 1848; that the depositions of the respectable parties, who gave these receipts, taken in the same case, show that the transfer to Purbhoo Dass was a *bond fide* transaction, and that the proceeds of the sale were applied to the liquidation of the just debts of the firm; that this *bagh* with its buildings formed only a very small part of the property of the insolvent firm, and that plaintiff had himself profited by the sales of other portions of that property; that the disputed property had not been specifically pledged to plaintiff as security for his debt; and that upon the whole, he could see no ground for supposing that the defendants had acted fraudulently, so as to invalidate acts otherwise legal.

The grounds of appeal are drawn up in the usual manner, but the opening sentences state, with more than ordinary fairness and perspicuity, the point really at issue. "The question is" says the appellant, "whether, after the insolvency of a banking establishment, and after notice had of suit filed, and after the issue of the order forbidding alienation, such a transfer is valid or invalid."

The Court see no reason to differ with the Principal Sudder Ameen on the points decided by him. Had the purchase money been appropriated by the defendants to some unknown purpose, the probability of a finding of fraud would have been very greatly increased, if indeed the inference could have been resisted at all; but, since it is clearly established that the money was fairly distributed amongst several of the creditors, and since the fact, that they accepted from seven to nine annas in the rupee obviates the suspicion of any undue partiality in their favor, the Court agree with the Principal Sudder Ameen in rejecting the plea of collusion. The answer however to the question propounded by the appellant involves very important interests.

To reject the transfer to Purbhoo Dass, without finding collusion, would be to adopt one of the principles of the English Bank-

rupt Law, namely, that one which provides for "the distribution of the debtors' property among the creditors in general instead of merely applying a portion of it to the payment of the individual;" and the Court are of opinion that it would be dangerous, even if it be legal, to adopt a portion of a peculiar system of law without introducing the whole. In the abstract, it certainly appears equitable that after insolvency has once been declared, the insolvent should not be permitted to alienate except for the benefit of *all* the creditors, and such accordingly is the law of England which vests in the assignees the bankrupt's estate "to be by them held for the benefit of the creditors at large," but there is no enactment which extends this law to India, nor is the principle recognized in practice by the mercantile community. As commerce improves, the legislature may find it necessary to protect the interests of trade by measures which shall secure the equal distribution of the whole of the insolvent's estate, and subsequent relief to the insolvent himself. At present, every creditor has a right to realize the whole amount of his debt without reference to the claims of others, and the only check which the law supplies is a finding of fraud in any particular case, the circumstances of which might justify such a verdict. It has already been observed that the transfer disputed in the present case cannot properly be considered fraudulent. The payment of the purchase money to a considerable number of the creditors, all of whom received less than they were entitled to, forbids the presumption of fraud, and the Court therefore dismiss the appeal, and uphold the decision of the Court below.

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The 10th February, 1851.

Present: { B. TAYLER,
 A. W. BEGBIE, } *Judges,*
 H. W. DEANE, *Offg. Judge.*

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CASE No. 178 OF 1850. { *Special appeal from the decision of*
H. Lushington, Esq., Judge of Moora-
dabad, dated 30th May 1848.

AMEER ALI AND OTHERS, (*Defendants*), *Appellants,*
versus

MOULVEE AHMUD ALI AND MUSSUMAT USHREUF-OONNISSA,
 (*Plaintiffs*), *Respondents.*

THIS is a review of judgment, in a case decided by this Court on the 21st May 1849, present: Messrs. Thompson, Begbie and Lushington. The ground for the application was the fact of one of the Judges who tried the appeal (Mr. Lushington) not being legally qualified to do so with reference to the prohibition con-

tained in Clause 4, Section 2, Regulation XIII. of 1810, the appeal being from his own decision as Judge of Mooradabad. The necessity for admitting the review is obvious, and the case was again heard this day by Messrs. Tayler, Begbie and Deane. The Court, as at present constituted, see no reason to dissent from the judgment recorded on the 21st May 1849, and, on the grounds specified in that decision, they are unanimous in dismissing the appeal.

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The 13th February, 1851.

Present : A. W. BEGBIE, Judge.

CASE No. 17 OF 1849. { *Regular appeal from the decision of
Mohumed Sulleem Khan, Additional
Principal Sudder Ameen of Ghazee-
pore, dated 21st September 1848.*

MOHUMED HUSSUN AND MOHUMED HOOSSEIN, (*Plaintiffs*),
Appellants,
versus

ARMUD-OOLLAH, AHSUN-OOLLAH, AND OTHERS, (*Defendants*),
Respondents.

THE plaintiffs sued to recover possession of half of talooquas Futhehra, &c., in zillah Ghazee-pore, and half of mouzahs Mohumdasspore, &c., in zillah Benares, with *wasildt*, estimating their suit at Rs. 9,954-12-16- $\frac{1}{4}$ gundas. They stated, that the estates in question had been acquired by Gholam Surwur (father of themselves and the defendants, by different wives); that the two branches of the family had formerly come to a private understanding, that although $\frac{2}{3}$ ths of the property, (including Koowerpore talooqua in zillah Jounpore), by right belonged to plaintiffs, and $\frac{1}{3}$ ths to defendants, yet, for the present, that each branch should retain possession of equal shares; that in pursuance of this arrangement, the Koowerpore estate was made over to plaintiffs, and the Ghazee-pore and Benares estates to defendants, which allotment continued in force till the end of 1239 Fuslee. From 1240 to the end of 1243, the Koowerpore estate was placed under *kham* management. In 1244 it was released from attachment, when the defendants applied to get possession of one-half of the Koowerpore estate, and the plaintiffs to obtain half of the Ghazee-pore and Benares property; that defendants got possession of their half of Koowerpore, and persuaded plaintiffs to farm the other half to them, both of Koowerpore and the Benares and Ghazee-pore property, from the commencement of 1249 Fuslee; that subsequently, defendants stole the *kubooleent* or counterpart lease from plaintiffs, who managed to recover possession of half of the Koowerpore pro-

perty, but were unable to recover their half of the Benares and Ghazeepore villages.

The defendants in reply stated that the Koowerpore property had not belonged to their father, but had been purchased by the parties themselves: they denied the alleged minority of the plaintiffs, which had been pleaded in excuse for their so long deferring to put forward their claim. They declared, that they, (defendants), had held possession of the property now claimed by plaintiffs for thirty years antecedent to the suit, by virtue of purchases made by themselves, Sheikh Gholam Ali and others: that plaintiffs present statement was opposed to that formerly put forth by them in July 1842, when they admitted that the whole property of Gholam Surwur had been divided between the two families, and that the disputed property was in the possession of defendants; they denied that any division amongst themselves had ever taken place, or that they (defendants) had ever taken the plaintiffs' share in farm; and they affirmed that the plaintiffs themselves had on a former occasion denied having given the lease to them. In short, they denied every part of the plaintiffs' statement.

The Principal Sudder Ameen dismissed the plaintiffs' claim on the following grounds. He observed that there were two points for consideration in the case: 1st, whether the property sued for by plaintiffs had been acquired by their father Gholam Surwur, as asserted by them; or whether it had been purchased by the defendants in concert with Gholam Ali and others; 2nd, supposing that the property be found to have belonged to Gholam Surwur were plaintiffs entitled to any portion of it, or were they debarred therefrom by the law of limitations. Regarding the first point, the Principal Sudder Ameen held that the evidence of the plaintiffs proved that the property had been purchased by Gholam Surwur, but that he, for certain reasons, had caused the names of his dependants to be recorded instead of his own, and that the defendants Ahmud-oollah and Hussun-oollah were the real occupants. On the second point, the Principal Sudder Ameen observed, that the plaintiffs had advanced three assertions: viz. the execution of a *theeka* or lease by them of half of the estates to defendants; second, the equal division of the property between the two branches of the family; third, that the minority had prevented their preferring their claim at an earlier period. These three positions the plaintiffs had failed to make good; they could produce no satisfactory evidence of the *theeka*, the farming lease, or *kuboolecut*, was not forthcoming, nor was the defendants' acknowledgment thereof satisfactorily proved; that it is most improbable, that if defendants had acknowledged the right of the plaintiffs to half the property, there should have been no formal deed to that effect executed; that the equal division of the property is not

proved by the plaintiffs' evidence, but that, on the contrary, Moulee Ruheem-oollah, one of his most respectable witnesses, had deposed that Gholam Surwur had in his life-time assigned the entire Koowerpore estate to plaintiffs, and the Benares and Ghazeepore estates, which form the subject of the present suit, to the defendants, agreeably to which distribution both parties held possession, and that on the death of plaintiffs' mother, disputes arose; that no other allotment appeared ever to have been made; that from the proceedings in a former case between these parties, it was apparent that *some* division of the property had been made between them by Gholam Surwur, in his life-time, according to which Koowerpore had come into the possession of plaintiffs, and the disputed villages into that of defendants, and that after such a division had been made, the plaintiffs were not entitled to any portion of the property now claimed by them. It appears that the defendants had by some breach of faith managed to get possession of half of the Koowerpore property, contrary to their father's distribution, but that as this is not the ground of action, the Court was unable to interfere therewith.

After a careful perusal of the proceedings in this case, I see no reason to interfere with the decision of the Principal Sudder Ameen. There is much contradiction in the evidence adduced by the plaintiffs, which favors the conclusion arrived at by the Principal Sudder Ameen, that a division of the property had been made by Gholam Surwur, during his life-time, between the two branches of his family. It is very strange that if plaintiffs had ever a proprietary right in the disputed villages, there should be not the slightest indication of the fact in the records of the Collector's office. The *theeka* alleged by plaintiffs to have been given by them of their half in the Koowerpore and the contested villages to the defendants is not satisfactorily proved. In some of the papers filed by plaintiffs mention is indeed made of a *theeka*, but so indistinctly, as not to justify the presumption that such an arrangement ever was made. The names of the estates included in the *theeka* are not specified. The documentary evidence being so imperfect and unsatisfactory, little faith can be attached to the oral testimony. That of itself might support the documentary evidence; but when the latter fails, the testimony of witness can avail little. I disbelieve the story of the theft of the *kuboolceut*. The plaintiffs state that they complained at the time to the police authorities, but I find no documentary evidence to prove that assertion. The long period allowed by the plaintiffs to elapse before they sued to recover possession is also strongly against them. They plead minority; but they became of age on or before 1244 Fuslee, (1836 A. D.), and this suit was not instituted till 30th September 1847, eleven years after! The

real facts of the case may not perhaps have been yet elicited, the registration of fictitious names having complicated the transaction; but it is quite clear to me, that plaintiffs have failed to make out their claim, and I accordingly dismiss their appeal.

The 13th February, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 233 OF 1850. { *Regular appeal from the decision of Rai Doobé Jowala Pershad, Principal Sudder Ameen of Azimgurh, dated 27th September 1850.*

J. STONEHOUSE, (*Plaintiff*), *Appellant*,
versus

H. T. DODSWORTH, (*Defendant*), *Respondent*.

THE plaintiff in this suit claims to recover from the defendant Rs. 5,880-5, being the amount of losses sustained by him in consequence of an alleged failure on the part of the defendant to perform the conditions of a contract.

The defendant sold to the plaintiff the Oonjee factory, together with all its appurtenances, lands under cultivation, and under engagement for cultivation, together with the *suttahs* for the cultivation of indigo: and executed a deed of sale on the 5th June 1849. There is no dispute in regard to the sale; but the plaintiff asserts that the *suttahs*, or engagements for the cultivation and delivery of the indigo plant, were not made over to him at the time of sale, and that when they were afterwards received by him from the defendant, they were found to be blank, with the exception of certain memoranda for the subsequent filling up of the documents. In answer to the enquiry which followed, the defendant informed the plaintiff that such was the custom of the factory sold, and that it was not usual to fill up the *suttahs* unless circumstances rendered it necessary that they should be filed in the Courts. The plaintiff had presently occasion to sue certain *aheers*, and he then applied to the defendant to fill up the *suttah* which belonged to the case. As the defendant had promised to fill up the *suttahs according to plaintiff's serishtah*, the plaintiff forwarded with the *aheer's suttah* a rough draft of the proposed contents. The defendant demurred, but ultimately prepared the document according to the wishes of the plaintiff, and the same was delivered to the plaintiff's *mookh-teear* for the purpose of being filed in the Civil Court. Shortly after this, it became necessary to sue several other *assamees*, and application was again made to the defendant to fill up the required *suttahs*. The defendant refused, and wrote his note of

the 17th October 1849, after which the plaintiff considered that all the *suttahs*, including the one which had been filled up, were unfit for presentation to the Court. The case against the *acheers* was allowed to go by default, and the plaintiff sues to recover the loss which he has sustained in consequence of the uselessness of the *suttahs* named in the deed of sale.

To this the defendant replies, that he delivered to the plaintiff all that the plaintiff had purchased, and that he is not responsible for plaintiff's inability to recover from the *assamees*. The assertion of the plaintiff, that he did not receive the *suttahs* at the time of sale, is declared to be untrue. He received them all, 68 in number, with the exception of 21, which were subsequently sent to plaintiff from *Oonjee*. The plaintiff never objected to the condition of these *suttahs* when he first saw them, and it is no part of the agreement that they should be filled up by defendant. In regard to the *acheer's suttah*, the defendant denies that he filled it up as it now appears, but in a different manner and according to his own *serishtah*. He asserts that the rate of profits, or penalty, upon each bundle of indigo, not delivered, is four annas according to the custom of plaintiff's factory of *Rajahputtee* as well of his own, and not one rupee as stated by plaintiff, in proof whereof he files *suttahs* of the *Rajahputtee* factory.

The Principal Sudder Ameen considers that the main point for decision is, whether any agreement for filling up the *suttahs* had been entered into by the parties, and he finds that no such agreement exists. The deed of sale transfers the *suttahs* unconditionally, and nothing can be found in the several English notes filed by the plaintiff which pledges the defendant to any further interference with them. The witnesses do not depose to any verbal agreement of the sort. The Principal Sudder Ameen then notices, that the notes filed by the defendant prove his assertion that only 21 *suttahs* were sent from *Oonjee*; and also that when plaintiff acknowledged the receipt of them he made no objection to their state. The four blank *suttahs* of the *Rajahputtee* factory, filed by the defendant, show that it is usual to keep these documents in an unfinished state, and account for the plaintiff's silence, on receiving such accounts, as part of the property purchased. From two other *suttahs* of *Rajahputtee*, the Principal Sudder Ameen infers the truth of the defendant's assertion, that four annas, and not one rupee, was the rate ordinarily charged as "profits" on each bundle of indigo not delivered according to agreement, and as these six *suttahs* had been made over to the defendant as part of the purchase money of the *Oonjee* factory, and were accompanied by the deed which transferred them, they were unquestionably genuine. The Principal Sudder Ameen therefore dismissed the plaintiff's claim.

From this decision the plaintiff appeals, urging the same grounds as those upon which he sued. He complains of some expression in the Principal Sudder Ameen's decree, objecting to the English notes as not satisfactory evidence, and desires that full weight should be given to their contents.

They deserve indeed to be attended to, for they explain the real nature of the transactions more correctly than all the pleadings, and all the rest of the evidence, oral or documentary. They speak too plainly, and it would have been better for the characters of the litigants had those notes never been written.

The question upon which the case rests, according to the Principal Sudder Ameen, is, whether any agreement was entered into in regard to the filling up of the *suttahs*. He has decided in the negative, but he has not noticed the principal argument adduced by the plaintiff. In the note written by the defendant on the 19th September 1849, these words occur. "As far as I am concerned, I am ready to order any man you choose to fill it up *according to your serishtah*". The appellant's *vakeel* indicates this passage as determining in his favor the point upon which, in the opinion of the lower Court, the whole case turned. This Court however cannot view it in that light. The passage occurs in the middle of a long note, evidently written without much care, and it refers rather to the person by whom the *suttah* should be filled up than to the conditions to be inserted therein. Moreover, the passage alludes only to one *suttah*, namely, that upon which the plaintiff had sued the *ahcers*: and although in other parts of this note the offer to fill up the *suttahs* is repeated, there is no where any further mention of the plaintiff's *serishtah*. The Court therefore does not regard this note as a promise, or as evidence of a promise, to fill up the *suttahs* in any particular manner, or even to fill them up at all, and it therefore agrees with the Principal Sudder Ameen in holding that no agreement in regard to the filling up of the *suttahs* had ever been entered into by the parties to the suit.

But it appears doubtful to the Court whether the Principal Sudder Ameen has accurately stated the point at issue between the parties. The defendant, it is to be observed, offered throughout the whole discussion and correspondence to fill up the *suttahs* according to *his own serishtah*, or rather according to the custom of the Oonjee factory: he objected to filling them up according to the alleged custom of the *Rajahputtee* factory, which belonged to plaintiff. In what then did the difference consist? The answer can only be *inferred* from the pleadings; but from them and from the statements made by the *vakeels* of both parties, it would appear that the difference consisted in the different rates demanded from the cultivators, who failed to deliver the plant for which they had entered into engagements. The plaintiff required that the penalty entered in the *suttahs* should

be one rupee a bundle, whilst defendant maintained that *his rate* was only four annas. Those passages, from which even this much is gathered, do not refer directly to the manner of filling up the *suttahs*, but to the principle upon which damages should be calculated in the event of the liability of the defendant being established. The Principal Sudder Ameen, however, has found that the defendant never engaged to fill up the *suttahs* at all, and this Court is satisfied that he never engaged to fill them up in any particular manner.

If the defendant delivered to the plaintiff blank *suttahs*, after giving the latter to understand that he was selling *suttahs* regularly filled up, and if, in consequence, the plaintiff sustained loss, the Court would hold the seller liable. The parties seem to have been aware of this ; for [although the Principal Sudder Ameen slurs the matter over] the point here at issue is almost the only disputed fact in the case. The plaintiff maintains that he never saw the *suttahs* at the time of sale, and that he took it for granted that they were all complete: but the defendant asserts that he delivered 47 *suttahs* at the time of sale, and 21 a few days afterwards, and that plaintiff made no objection at the time. The Court gives the preference to the story of the defendant. Independently of the oral evidence, there are grounds for believing that the plaintiff was perfectly well aware of the condition of the *suttahs* which he had purchased. The purchase, including without dispute 68 *suttahs*, was made on the 5th June 1849, and in a note signed by the plaintiff and addressed to the defendant, bearing date the 6th, apparently altered from the 5th of June, the plaintiff enquires "have you sent for the 21 *suttahs*?" If the plaintiff had received none of the 68 *suttahs*, why should he ask for "the 21." Again, on the 10th June he acknowledges the receipt of "21 pieces of stamp paper, *suttahs* for bundles," yet nothing is said of their being other than such as the plaintiff expected to receive. It is not till the 7th September following that we find the plaintiff in a note, copy of which has been filed by himself, addressing the defendant thus. "The *suttahs* you handed over to me require filling up, and you agreed to do the needful, should I require to use any of them in Court;" and even here there is no complaint that he had been deceived in regard to the condition of the *suttahs*. It appears too that it was by no means an unknown practice even in the *Rajahputtee* factory for the *suttahs* to be kept in an unfinished state, for the defendant has filed several blank *suttahs* of the *Rajahputtee* factory, concerning the genuineness of which no doubt can be entertained. On these considerations the Court has come to the conclusion that the defendant did deliver to the plaintiff *suttahs* such as he had sold to him.

The two English letters, which the parties have filed with the *misl*, leave little room for doubt as to the real nature of the affair;

and the Court observes with deep concern the manner in which it has been conducted by Europeans, who are apparently persons of respectability, and who might have been expected to set an example to others. When the *aheers' suttah* was sent by the plaintiff to be filled up by the defendant, a rough draft of the desired contents was sent with it. The defendant replied by advising the plaintiff not to prosecute if he had received indigo plant in proportion to the advances actually made, [see note 9th September 1849,] and according to the plaint, he refused to fill up the *suttah*. The plaintiff, however, continued to press the defendant, as appears from the plaint, and from plaintiff's letters dated 10th and 27th of September. The defendant at last consented, and on the 2nd October wrote as follows to plaintiff. "The enclosed" [admitted to be the *aheers' suttah*] "should have been sent you ere this, but having waited the whole of yesterday for that rascal I wrote to, and seeing no signs of his coming, I was obliged to get the needful done by another person, and it is really so neatly done, that I be blowed if you could tell the difference between one ball and the other."

The plaintiff having carried his point in regard to the *aheer's suttah*, on the 16th October, forwarded to defendant three more *suttahs*, which he requested might be filled up. The defendant however would go no farther, and he wrote the letter of the 17th October, some parts of which are in keeping with his first honorable refusal to fill up the *suttahs* improperly, whilst other parts are consistent only with the weak acquiescence to which he had been subsequently guilty.

" My dear Stonehouse,

" Have received the French Cook, for which accept thanks.

" With reference to the *suttahs* I am sorry to say that I cannot by any means fill them up according to your *serishtah*, as such was never intended at the time of their writing. And until I see the result of the one already filled up, I cannot make myself bold enough to do up another. It was nothing more I assure you than to please and oblige you that I went out of the right and just course in one instance, after you told me that you had already complained upon the *assamees*, and that a different sort of *suttahs* would ruin your *maomlah**, that led me to it, or else depend I would never have done so at a time. I distinctly told Bustee Khan to see that the *suttahs* were according to my *serishtah*, and which Bustee Khan informed them of at the time of their writing. So if you wish them to be what they really would be had I kept up the factory, then of course I can have no objection to fill up as many as you please. But if you wish them to be according

* Sic in Orig.

to your *suttah*, just wait a little time longer, and see the result of the one already in Court before trying another, for you must know, Stonehouse, there is no beauty in suing, but gaining is the thing, as I have already told you. The *ahcers'* case in Court, I much fear, will call me up there also, a place I have not been into since my arrival in this district. I am, I assure you, entirely at your command, but only have a little patience, and see how this ends, and if all right, then fire away, and I will stand assistant with powder and shot at your elbow.

(Signed) H. T. DODSWORTH.

17th October, 1849.

P. S.—All my *suttahs* are of one general form, and I can have no hesitation in showing them to the Court if called upon to do so. But yours I find different *suttahs* have different forms. Now those you gave me of Shewdeen, *ahcer*, &c. are quite different to the one filled up, and this again different from that. How is all this?"

It has been necessary to quote the above letter in full, lest it should be misrepresented by extracts: and in the opinion of the Court it leaves little room for doubt as to the real nature of the present suit. The plaintiff purchased the Oonjee factory from the defendant, and amongst other property received from him the blank *suttahs*, that is to say, stamp papers bearing the signatures of the *assamees*, and of the witnesses to the signatures, as also memoranda of the advances made, the quantity of land to be cultivated, and the number of bundles of the plant to be delivered, but not filled up. When the purchaser desired to "use" these *suttahs*, he applied to the seller to have them filled up according to a form which, the Court is afraid, was not the form to which the *assamee* had assented, and on the refusal of the seller to aid in this proceeding, the purchaser brings the present action for damages.

It matters nothing whether the difference in the two *serishtahs* consisted in the different amount of penalty, as was admitted at the time of trial, or in something else. It is equally clear that the plaintiff had once persuaded the defendant to do that which he knew to be "out of the right and just course," and that he sued him for damages because the defendant would not do so again.

The Court considers the practice of preparing documents, as these *suttahs* were prepared, to be highly objectionable, and, as the preparers might find, exceedingly dangerous. It is nothing to the purpose that the practice is general, if indeed it really be so; it is not the less improper; and such documents, setting aside altogether the question of fraud, would be utterly invalid as evidence in any Court of justice. But when in addition to the defective execution, the document is completed in a manner different

from that expected by the party who signed the blank deed, the Court can regard the transaction in no other light than that of a fraud: a fraud too approaching to the verge of forgery. Nor is the case improved by the nature of the oral evidence. Five witnesses on the one side swear that at the time of executing the deed of sale at Azimgurh 47 *suttahs* were delivered in their presence to the purchaser; and three witnesses on the other swear that only one receipt was made over on that occasion. It was a material point, for if the plaintiff received 47 blank *suttahs* when he made the purchase, he could not complain that he had been deceived. Such direct contradictions almost necessarily involving perjury on one side or the other, are unhappily common in this country; but the Court did not expect to find them in a suit in which both parties are Europeans holding a respectable position in society.

The Court dismisses the appeal, and confirms the decision of the Court below.

The 13th February, 1851.

Present: A. W. BEGGIE, Judge.

CASE No. 43 OF 1850. { *Special appeal from the decision of Mr. E. F. Tyler, Officiating Judge of Agra, dated 13th September 1850.*

GOSHEIN MADHO RAOJEE, (*Plaintiff*), *Appellant*,

versus

BETHUL NATH AND OTHERS, (*Defendants*), *Respondents*.

THIS case is reported at page 64 of the printed decisions for Eillah Agra for the month of September last.

A special appeal was admitted to determine "whether the *bywustah*, agreeable to which the Judge decided the case, was called for in the manner prescribed by judicial usage."

On examining the proceedings, I find that the *bywustah* has been elicited in an unusual and objectionable manner. The order of the officiating Judge, calling for the *bywustah*, is to the following effect. "It being necessary and proper in this case to send for a *bywustah* from the Pundit of the Sudder Adawlut, therefore it is ordered that the hearing of the case be postponed this day, and that the record of the case be sent, with the demand for a *bywustah*, to the Pundit of the Sudder Court, who, after examining the proceedings, will, in the period of one week, forward his *bywustah* to this Court." This is not the mode in which legal opinions should be called for by the Civil Courts from the law Officers. Clause 1,

Section 16, Regulation III. of 1803 provides, that the law Officers "shall attend to expound *the law* of their respective persuasions, in cases in which recourse may be required to be had to it," and Clause 2, Section 6, Regulation V. of 1831, declares that the Moonsiffs "are to obtain an exposition of *the law* from the law Officers of the zillah Courts, to whom they are to transmit a written abstract of the case for this purpose." In the form of oath prescribed by Section 7, Regulation XI. of 1803 to be taken by Hindoo Law Officers, they are required to answer *all questions* that may be put to them, in writing, or orally, by the Court. It is the evident intention of the law as well as the established practice of the Courts, that specific questions *on points of law only* should be laid before the law Officers, and that the *facts* of the case should be found by the Court itself. But, under the general terms, in which the reference in the present case was made, the Pundit of the Sudder Court was constituted Judge of the *facts* as well as the *law*. In short, the Judge has expressed no opinion as to *the facts*, but has delegated the trial of the entire case to the Pundit, an extent of power and responsibility altogether un contemplated and unauthorized by the law. The appellant has good reason for objecting to such a proceeding. I annul the decision of the officiating Judge, and remand the case for retrial with reference to the foregoing observations.

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The 13th February, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 42 OF 1851.

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*Special appeal from the decision of
Rai Doobé Jowala Pershad, Additional
Principal Sudder Ameen of Zillah
Azimgurh, dated 12th September 1850.*

MOULVEE NADIR ALI, (*Defendant*), *Appellant*,

versus

PULTOO AND DHAREE, (*Plaintiffs*), *Respondents*.

THE plaintiffs sued to recover the value of the fruit of some *kuthul* trees, which had been gathered by the defendant without the consent of plaintiffs, on the plea of his being entitled to a share of the produce, as zemindar of the village. The defendant justified his act, and on this issue was joined.

The Moonsiff, being of opinion that the defendants had established their plea of justification, dismissed the plaintiffs' claim.

The Additional Principal Sudder Ameen reversed the Moonsiff's decision, and decreed in favor of plaintiffs, on the ground that

the claim of the defendant to share in the produce of trees was not supported by any law or custom of the country.

A special appeal was granted to determine "whether the Principal Sudder Ameen was justified in setting aside the report of the Ameen, deputed by the Moonsiff to make a local enquiry, without taking measures to test its accuracy.

The decision of the Additional Principal Sudder Ameen is unsatisfactory. The Moonsiff, previously to deciding the case, very properly deputed an Ameen to the village to make enquiry relative to the usage alleged by the defendant to exist. The Ameen reported that such a usage did exist, although the exact share to which the zemindar was entitled did not appear. The report of the Ameen was received by the Moonsiff *as evidence*, and it formed the groundwork of his decree, a mode of proceeding perfectly regular, and agreeable to the provisions of Section 18, Regulation III. of 1803. The Additional Principal Sudder Ameen was not at liberty to set aside the Ameen's report in the summary mode he has. He should have stated his reasons for discrediting the Ameen's report, and he was at liberty, if he thought proper, to call for a further report, or to take additional evidence. There may be no written law, or *general* custom, on the subject, as stated by the Additional Principal Sudder Ameen, but there may be a *local* usage, which has the *force of law*; and the Additional Principal Sudder Ameen was not competent to declare, *ex cathedra*, in the face of the Ameen's report to the contrary, that there was no such usage in existence. Each pergunnah or village may have a peculiar usage which may be unknown to the administrators of the law, until the fact is proved by evidence. I accordingly annul the Additional Principal Sudder Ameen's decision, and remand the suit, in order that he may reconsider his judgment with advertence to the foregoing remarks.

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The 18th February, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 76 OF 1849. { *Regular appeal from the decision of
Moulvee Mohamed Jumeel-ooddeen
Khan, Principal Sudder Ameen of
Benares, dated 26th December 1848.*

PURSOTUM POOREE, (*Plaintiff*), *Appellant*,

versus

GOSHAM HURKISHOON POOREE, (*Defendant*), *Respondent*.

THE plaintiff sued to obtain possession of half of six *muths*, (Hindoo temples) valued at Rs. 25,500, and for Rs. 1,37,500, being

half the value of silver and gold ornaments appertaining thereto. He represented himself as entitled to the share above specified as joint successor with the defendant to Raj Pooree, a former incumbent of the *muths* in question; but that defendant contrived to get entire possession of the *muths* during plaintiff's absence in Nepaul, whither he had gone for purposes of trade. The plaintiff further represented, that during his occasional residence at Benares, he was in the habit of residing with the defendant.

The defendant in reply stated that the plaintiff never was a sharer in the *muths*, with his (plaintiff's) gooroo Mukhun Pooree, as asserted by him; that the said Mukhun Pooree died fifty-four years ago, leaving only one heir, viz: Duljeet Pooree, who executed a release for himself and his *chela* Jeet Pooree in favor of defendant; that the original incumbent Raj Pooree died twenty-eight years previous to the presentation of a petition by plaintiff in the Civil Court on the 19th April 1847, and that consequently his suit is barred by the law of limitations.

The Principal Sudder Ameen dismissed plaintiff's claim, observing that the suit was barred by lapse of time, the person from whom he professed to inherit having died twenty-eight years ago, within which period plaintiff had not held possession; that the heirs of Mukhun Pooree had executed a release for their claims previously to plaintiff becoming a *chela*; that according to the established usage of this particular sect, when one *chela* has obtained his share of the inheritance, no other *chela* is entitled to any thing more; that defendant's witnesses prove that plaintiff was disqualified for the incumbency in consequence of his having a family; that he lived apart from defendant; and that the latter was the sole proprietor of the *muths*.

I see no reason to interfere with the Principal Sudder Ameen's decision. The evidence adduced by the plaintiff is very unsatisfactory, the testimony of several of his witnesses being opposed to the justice of his claim and favorable to the defendant; he has not produced a tittle of documentary evidence. On the other hand, the defendant has exhibited numerous decrees and other documents, which demonstrate that he has been uniformly recognized as the sole occupant and proprietor of the *muths*, and that too for a period far beyond the limit prescribed by law for the institution of adverse claims.

The appeal is accordingly dismissed.



The 19th February, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 46 OF 1851. { *Special appeal from the decision of Moul-
vee Ahmud Hussun Khan, Principal
Sudder Ameen of Mooradabad, dated
16th August 1850.*

IMDAD HOOSSEIN, (*Defendant*), *Appellant*,
versus

SYED GHOLAM ALI SHAH, (*Plaintiff*); *Respondent*.

THE plaintiff claims certain building ground in the town of Amroha, resting the claim on a deed of sale, 7th Zeekat, 1224 Fuslee, and subsequent possession.

The Moonsiff found that the plaintiff had not been in possession within twelve years, and he accordingly dismissed the suit under the law of limitation.

In appeal, the Principal Sudder Ameen finds that the plaintiff has been in possession up to a late period, and conceiving this to be the only disputed point in the case, he did not think it necessary to remand the case to the file of the Moonsiff, but disposing of it himself, recorded a decree in favor of the plaintiff.

A special appeal from the decision was admitted to try, whether, in thus disposing of the case himself instead of remanding it, he had acted in conformity with judicial usage.

The Court is of opinion that the rule, which provides that the Appellate Court shall not decide on its merits a suit which has been dismissed on a special plea by the lower Court, has been infringed in the present case.

The point of possession within the prescribed period has been determined in the plaintiff's favor, but the *right* is founded on the deed of sale, which is declared by the defendant to be false. How far the fact of possession supports the title deed is matter for the consideration of the Court, which tries the case on its merits, a proceeding which could not properly take place in the Court of the Principal Sudder Ameen. The Principal Sudder Ameen, who appears to have been perfectly well aware of the law, observes, that the Moonsiff does not deny the *right* of the plaintiff: such inferrible acquiescence on the part of the Moonsiff, who threw out the case on other grounds, does not amount to a judicial finding. The Court accordingly annuls the decision of the Principal Sudder Ameen, with the exception of that part of it which declares the claim to have been brought forward within the prescribed period, and remands the case to the file of the Moonsiff, that it may be tried on its merits.

The 19th February, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 60 OF 1849. { Regular appeal from the decision of Syed
Mohumed Villayat Ali Khan, Principal
Sudder Ameen of Allygurh, dated 26th
January 1851.

NITIANUND, (*Defendant*), *Appellant*,

versus

COLLECTOR OF ALLYGURH ON THE PART OF GOVERNMENT,
(*Plaintiff*), *Respondent*.

THIS suit was brought to set aside a decree obtained by the defendant in the Court of the former Principal Sudder Ameen of Allygurh, under date 1st March 1842, recognizing the validity of a *hibbeknamah*, executed in his favor by Mussumat Maha Kuor, thakooranie of talooqua Jugatal; also, to expunge the name of the defendant from the Collector's register, and to recover the *malikana* which might be paid to the defendant between the date of the institution of this suit and the recovery of possession.

The case for the plaintiff was stated as follows. The estate in question was placed under charge of the Court of Wards in 1811, on the ground of the proprietor, Mussumat Maha Kuor, being (as a female) disqualified for the management: several persons were in succession appointed by the Court of Wards to the office of manager. In 1838, on a complaint preferred by the thakooranie, the last manager, by name Mitta Ram, was displaced by the Court, and all the villages separately settled with farmers, a *malikana* allowance being made to the proprietor. In this position the talooqua still continues, the *malikana* being paid to the thakooranie from the Collector's treasury. So long as the estate remains under the Court of Wards, the proprietor is not at liberty to alienate it, but the defendant having fraudulently managed to obtain execution of a *hibbeknamah* for the property from the thakooranie, instituted a suit thereon in the Court of the former Principal Sudder Ameen, and obtained a decree, concealing the fact of the estate being under the Court of Wards, and not making the Government a defendant in the suit. This decree having been thus obtained by fraud, the Government now sue to set it aside, and to invalidate the *hibbeknamah*, which formed the ground of action.

The defendant replied, that the Government had no right to bring this action; that the Sudder Board, in their letter of the 17th November 1846, had declined to authorize its institution; that when the talooqua was placed under the Court of Wards, an order

had been passed by the Board of Commissioners, that so long as the estate remained under the Court, no increase should be made to the jumma; that in 1246 Fuslee, a new settlement had been made with farmers, and an increase of Rs. 2,600 effected, after which no manager had been appointed by the Court; that the Collector had made no objection to execute the decree obtained by the defendant; that the estate had thus been taken from under the superintendence of the Court; that the competency of the thakooranie to manage the property had been enquired into, agreeably to the provisions of Section 29, Regulation VIII. of 1805, and admitted; and that the *hibbehnamah*, now sought to be annulled, had been executed by the thakooranie subsequently to that event, and was therefore perfectly valid.

The Principal Sudder Ameen gave a decree in favor of the plaintiff. He observed, that the only point for consideration was, whether, at the time the deed was executed, the estate was or was not under charge of the Court of Wards, and whether the thakooranie was competent to execute such a deed without the consent of the Court of Wards; that it appeared that in 1218 Fuslee, the talooqua was placed under the Court of Wards, and a manager appointed; that in 1244 Fuslee, the thakooranie petitioned that the estate might be released from the Court of Wards, which request was disallowed on the 2nd August 1837, on the ground of her continued disqualification; that in 1838, the manager was removed, and the estates placed under charge of the tehseeldar; that, subsequently, a settlement in farm of each village was effected, and a *malikana* allowance fixed for the thakooranie, which arrangement was still in force; that in his (the Principal Sudder Ameen's) opinion, the estate was still under charge of the Court of Wards, and that the defendant was unable to adduce any proof of its having been released; that the arguments used by the defendant, to show that the estate was no longer under the Court, were of no weight, inasmuch as the farming settlements had been made by the Court of Wards for the benefit of the thakooranie, and the Collector had only obeyed the order of the Court in substituting the name of the defendant in the *malgoozaree* register for that of the thakooranie; that Government was not a party to the former suit, and, consequently, not in a position to contest the decree; and that the only mode of obtaining redress was by the institution of this suit. Under these circumstances, the Principal Sudder Ameen considered that the thakooranie was not competent to execute the *hibbehnamah*, which was consequently invalid, and, finally, that the circumstance under which the mutation of names had been effected in the talooqua of Orungabad Kusser, in zillah Boolundshuhur, were different, and could not be cited as a precedent in point.

I quite agree with the Principal Sudder Ameen in the view taken by him of this case: his reasoning is quite correct. There is no proof that the estate had ever been released from the Court of Wards. The manager last appointed by the Court, Mitta Ram, is a brother of the present defendant, and it was on the discovery of his malversations that the Court of Wards removed him, and ordered a farming arrangement to be made as the most beneficial for the thakooranie. The settlement of estates under the Court of Wards is by Section 16, Regulation LII. of 1803, liable to be "determined in the same manner as the assessment of other lands, subject to the payment of revenue to Government." The increase effected in the jumma in 1838 is therefore no proof that the talooqua had been released from the Court of Wards' superintendence. The appellant adduces the fact of a *durkhast* having been taken from the thakooranie as a proof that her competency to manage her estate had been admitted, but I do not regard it in that light. The *durkhast* so taken were mere matters of form, with a view to the recognition and preservation of the thakooranie's proprietary rights, the *real malgoozaree* engagements were those taken from the farmers. I can find no proof in support of the assertion made by the appellant, that the competency of the thakooranie had been formally acknowledged by the Court of Wards under the provisions of Section 29, Regulation VIII. of 1805. Had such been the case, the Court of Wards would have reported the fact to Government, as required by Clause 3 of the above Section. So far from this being the case, I meet with constant indications of the estate being still under the Court. The proceedings relating to talooqua Orungabad Kusser, in the Boolundshuhur district, will not justify the transfer in the present case: as that matter is not at present before the Court, I forbear to record any opinion as to the legality of the transaction, of the fraudulent nature of the transfer in the present case I entertain no doubt. It is sufficient to state in proof of this, that the thakooranie is old and infirm, and that the defendant is the *brother* of the dishonest manager, Mitta Ram, dismissed by the Court of Wards in 1838; neither do I entertain the slightest doubt as to the competency of the Government or Court of Wards to institute this suit. It is the manifest duty of the Court to guard the interest of those whose estates are placed under its superintendence, and to protect them from such fraudulent practices as those apparent on these proceedings. The decree of the 1st March 1842 had been surreptitiously obtained by the defendant, it has now been very properly set aside.

A new plea has been urged by the defendant in his appeal to this Court, viz. that no enquiry was made into the competency of the thakooranie in the manner provided by law previous to her

estates being placed under the Court. In reply to this, it is sufficient to observe, that agreeably to Clause 1, Section 9, Regulation LII. of 1803, the simple declaration of the Court of Wards is quite sufficient in the case of a female proprietor to establish her incompetency, which can only be removed by a subsequent declaration of a contrary tendency by the same authority under the provisions of Clause 3, Section 29, Regulation VIII. of 1809. The "*onus probandi*" as to this point lay with defendant, and he has not proved it. I accordingly dismiss the appeal; the respondent having attended to defend this appeal spontaneously will pay his own costs.

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The 20th February, 1851.

Present: H. LUSHINGTON, Judge.

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CASE NO. 193 OF 1849. { *Regular appeal from the decision of
Moulvee Mohumed Luteef Khan, Prin-
cipal Sudder Ameen of Goruckpore,
dated 21st July 1849.*

HURCHURUN LALL, (*Plaintiff*), *Appellant*,

versus

SHEWCHURUN LALL, RAMBUKSH, JOOMUN, GHOSE MOHUMED,
AND INDURDUT, (*Defendants*), *Respondents*.

THE Plaintiff is the treasurer of the Goruckpore Collectorship. Sheochurun Lall, defendant, was his *purkheea*. The remaining defendants were the securities of Sheochurun Lall to Government. A security bond had been taken from Hurchurun Lall also, by which he became responsible for any embezzlement committed by the several treasury amlah named therein, and, amongst others, for the defendant Sheochurun Lall. There were four security bonds in all, taken on different dates, totally unconnected with each other, and each binding the party who signed it to pay into the Government treasury any sum which Sheochurun Lall might make away with.

In 1848, an embezzlement took place to the amount of Rs. 8,371-10-1: Sheochurun Lall was proved to be the guilty party, and was sentenced by the Criminal Courts to five years imprisonment. Hurchurun Lall was called upon as security, and he paid into the Treasury the amount of the defalcation.

The Plaintiff Hurchurun now brings his action against the other securities, as well as against Sheochurun himself, to recover from them the sum which he has been obliged to pay. The plea is not that the defendants are joint securities with plaintiff, and therefore ought to pay a share, but that they are the securities of Sheochurun Lall, and ought therefore to hold plaintiff harmless.

The defendants plead that no action lies against them. They were securities for Sheochurun they admit, but so also was the plaintiff. The Government, they urge, might have realized the deficiency from any of the *purkheea's* securities, but it is not competent to the one, who was called upon to pay, to shift the responsibility upon the others by means of a suit in Court.

The Principal Sudder Ameen adopted the view of the case taken by the defendants, and seeing nothing in the security bonds which could make them responsible to the plaintiff, he passes a decree against Sheochurun Lall, and releases the rest.

This Court fully concurs in opinion with the Principal Sudder Ameen. Hurchurun Lall was as much security for Sheochurun Lall as any one of the defendants, nor is there any material difference in the terms of the security bonds which they signed. The defendants were responsible to Government, not to the plaintiff, or to each other, nor is there any thing in the whole history of the case which can justify a contrary conclusion. The plaintiff was possibly misled by the revenue authorities, who delivered up to him the security bonds of the defendants, in order that he might sue upon them, and thus involved him in unnecessary and unsuccessful litigation. So far from having any right to recover the whole amount from the other securities, the Court is of opinion that he could not recover from them even a portion of it; but in saying this the Court refers only to the case before it, and expresses no opinion in regard to joint securities, who have bound themselves by the same deed, or under circumstances which place the parties in the same position as if they had signed the same deed. No such circumstances are to be found in this case, nor indeed has the plea been advanced by the plaintiff.

In the petition of appeal it is objected that the appellant has been charged with the vakeel's fees paid by Ram Buksh, defendant, and also with the full amount of the fees paid to the vakeel of Joomun and Ghose Mohamed. The plaintiff submits that as the answers of these defendants were of the same nature, and their interests the same, there was no necessity for their employing separate vakeels, and that if they chose to do so, he, plaintiff, ought not, according to the usage of the Courts, to be made liable for the costs.

The Court admits the principle that a losing party ought not to be made responsible for costs which have been wilfully and

unnecessarily raised in amount by successful litigants; but the present case does not seem to be of this nature. No connection has been shown between the defendant Ram Buksh and the defendants Joomun and Ghose Mohumed. The security bond signed by the former is dated 12th September 1847; that signed by the two latter is dated 8th January 1845. For any thing the Court knows to the contrary, these two parties may not be even acquainted with one another, they may be at enmity with one another: their property may lie in different parts of the country. The case before the Court furnishes in itself a very good illustration of the principle. Ram Buksh may employ one vakeel, and Joomun with Ghose Mohumed may employ another, and the plaintiff will be responsible for the costs of both; but if Joomun and Ghose Mohumed had employed two separate pleaders, they would have been permitted to charge against the plaintiff the full costs of only one.

Under this view of the case the Court dismisses the appeal, and upholds the decision of the Court below.

The 27th February, 1851.

Present: A. W. BEGBIE, Judge.

CASE NO. 55 OF 1851. { *Special appeal from the decision of
R. J. Tayler, Esq., Judge of Jounpore,
dated 4th September 1850.*

SHEIKH RUMZANEE, (Defendant), Appellant,

versus

SOOBHANEE AND URZANEE, (Plaintiffs), Respondents.

THIS is a suit to dispossess the defendant from a piece of ground, valued at Rs. 12-8, agreeably to the conditions of a written agreement dated 31st May 1847. On referring to the printed decisions for the month of September, I found that the Judge had omitted to send to the Press the *grounds* of his decision in this case, and I was consequently under the necessity of sending for a copy of his decision in manuscript; this has been now received, and is as follows.

“ This case has been brought on according to the provisions of Section 16, Regulation V. of 1831, and no sufficient ground has been shown to impugn the correctness or justness of the Moonsiff's decision. It is therefore confirmed.”

A special appeal is granted to try, "whether the lower Courts ought not to have disposed of the defendant's plea of the under-valuation of the suit previously to disposing of the case on its merits."

On referring to the proceedings, I find that the defendant objected to the valuation of the suit in the Court of first instance, alleging that the real value of the ground was Rs. 350 instead of Rs. 12-8, at which the plaintiff had valued it. Of this objection the Moonsiff takes no notice in his decision, and it was also overlooked by the Judge, although again urged in the defendant's petition of appeal to that Officer. It has now for the third time been pleaded by the defendant in his appeal to this Court, and, with reference to the provision contained in Article 8, Schedule B, Regulation X. of 1829, I annul both the decisions of the lower Courts, and remand the case to the Moonsiff to be dealt with as above directed.

The 3rd March 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 148 OF 1850. { *Special appeal from the decision of
S. S. Brown, Esq., Judge of Goruck-
pore, dated 14th November 1849.*

BABOO DULJEET SUHAI AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

HOOKEM RAI AND OTHERS, (*Defendants*), *Respondents*.

THIS case will be found reported at page 237 of the printed decisions for zillah Goruckpore for 1849.

A special appeal was granted to determine, "whether the Judge has rightly determined that the petitioner's suit is barred by the law of limitation."

This appeal was admitted in consequence of special appeals having been admitted in three other cases of a similar nature, the point at issue in all being, whether the period for the cognizance of the suit should be calculated from the date of the decree obtained in the Court of first instance, or from that of the decision of the appellate Court. It has been ruled in those cases,* that the period must be calculated from the date of the original decree, and the Judge's decision, in the present case, is therefore quite correct. This point being thus disposed of, the second, as to the applicability of Construction No. 980, does not arise. The appeal is accordingly dismissed, with costs.

* See printed Decisions for
7th December 1850.

The 3rd March, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 149 OF 1850. { *Special appeal from the decision of
S. S. Brown, Esq., Judge of Goruck-
pore, dated 29th January 1850.*

BABOO DULJEET SUHAI AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

SHEORAJ SUHAI AND OTHERS, (*Defendants*), *Respondents*.

THIS case is reported at page 29 of the printed decisions for zillah Goruckpore, for the year 1850. The case is precisely similar to case No. 148 this day disposed of. The special appeal was admitted at the same time and on the same grounds as in that case, and is now dismissed, with costs, for the same reasons.

The 3rd March, 1851.

Present : A. W. BEGBIN, Judge.

CASE No. 205 OF 1850 { *Special appeal from the decision of
Moulvee Ahmud Hoossein Khan, Prin-
cipal Sudder Ameen of Mooradabad,
dated 27th May 1850.*

NURPUT SINGH AND NUND LALL, (*Plaintiffs*), *Appellants*,
versus

ODOO SINGH, (*Defendant*), *Respondent*.

THE plaintiff sued to recover Rs. 102-10-9, principal and interest, on account of his share in the profits of mouzah Shekkopore, for 1254 Fuslee. In the Court of the Moonsiff he obtained a decree, which decision was reversed in appeal by the Principal Sudder Ameen, and the plaintiff nonsuited.

A special appeal was admitted "to try whether the Principal Sudder Ameen is correct in his grounds of nonsuit in this case."

I am of opinion that the Principal Sudder Ameen was not justified in nonsuiting the plaintiff. It appears that the defendant (who is the Sudder malgoozar of the village) in his reply to the suit in the Moonsiff's Court, denied that any thing was owing from himself to the plaintiffs, and averred that the plaintiff himself had collected his own share from the *assamees*. The Moonsiff observed, that the defendant did not deny the right of the plaintiff to share in the profits of the village, and that the only question was, whether or not the plaintiff had, (as asserted by defendant) made the collections himself, and on this point he believed the evidence for the plaintiff rather than that for the defendant, and decreed in favor of the former. When the case came before the Principal Sudder Ameen in appeal, the defendant altered his plea: he now admitted what he had before denied, viz. that a balance was due from the *assamees*; but he denied his liability for the same, on the ground that he had not collected it from them to the prejudice of the plaintiffs. The Principal Sudder Ameen nonsuited the plaintiffs, because they had had not made the *assamees* co-defendants, and because, in his opinion, it would be unfair to hold the defendant responsible for balances which he had not realized, and he refused to allow the plaintiff to adduce proof that the *assamees* had paid up their rents, because this ought to have been done in the Court of first instance. The injustice of this decision is palpable. The point at issue between the parties in the Moonsiff's Court (as elicited from their pleadings) was not whether any balance was or was not due from the *assamees*. Both

parties admitted that the *assamees* had paid their rents in full. The only question was, to whom had they paid the rent, to the plaintiffs or to the defendant? The defendant, having failed to prove his plea that the plaintiffs had collected, was not at liberty, in the appellate Court, to put forward a *new* plea altogether inconsistent with his original defence. There was no necessity (as supposed by the Principal Sudder Ameen,) to make the *assamees* defendants, as both parties admitted that nothing was due from them. My attention has been drawn by the appellants' vakeel to another suit between the same parties, (decided by this Court in appeal on the 29th June 1850) on that occasion, I observe, that the defendant adhered to his original plea. I annul the decision of the Principal Sudder Ameen, and remand the suit to be retried by him on its merits, with advertence to the foregoing observations.

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The 8th March, 1851.

Present: H. LUSHINGTON, Judge.

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CASE No. 206 OF 1850. { *Special appeal from the decision of
Moulvee Mohumed Hoossein Khan,
Principal Sudder Ameen of Bareilly,
dated 18th June 1850.*

MUSSUMAT BUSSEERUN, (*Defendant*), *Appellant*,
versus

KALEY KHAN, (*Plaintiff*), *Respondent*.

THE plaintiff sues to bring to sale the rights and interests of Mussumat Ameerun in certain building ground in the town of Shahjehanpore, he having a decree upon Mussumat Ameerun, and Mussumat Busseerun objecting to the realization of the money by the sale of this land.

The Moonsiff dismissed the claim, but the Principal Sudder Ameen decreed it. In doing so, however, he omitted to dispose of an important plea urged by Mussumat Busseerun, namely, that she had been in *bona fide* possession of the property upwards of twelve years, and that therefore the claim of the plaintiff was barred by lapse of time.

A special appeal was admitted to try, "whether the Principal Sudder Ameen, in having omitted to determine the point of possession, pleaded by the defendant, appellant, had not overlooked a material issue in the case."

It is admitted by both parties that the plea was urged, and that it has not been disposed of. The Court therefore annuls

the decision of the lower Court, and returns the case to the file of the Principal Sudder Ameen, that he may pass a fresh decree after disposing of all the pleas of the parties to the suit.

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The 11th March, 1851.

Present: H. LUSHINGTON, Judge.

CASE NO. 50 OF 1850. { Regular appeal from the decision of
Moulvee Mohumed Ruzzee-ooddeen
Khan, Principal Sudder Ameen of
Allypurrh, dated 27th September 1849.

J. O'B. SAUNDERS, (*Defendant*), *Appellant*,
versus

RAO KHOMAN SINGH, (*Plaintiff*), *Respondent*.

THIS is an action brought to redeem the mortgage of mouzah Gumbheera, 19 villages, on the ground that the mortgage money, with legal interest, had been realized by the *usufruct* of the land.

The Principal Sudder Ameen has dismissed the claim of the plaintiff, on the ground that the sum due to the mortgagee has not been realized; but, in coming to this conclusion, he has alluded to two separate principles upon which the calculation might be made, one of which shows a larger, and the other a smaller, balance against the mortgager. The object of the mortgagee, appellant, is to expunge from the decree all mention of the account, which shows the smaller balance in his favor.

The Principal Sudder Ameen has not declared any fixed sum to be due from the mortgager. All he has declared is that, whether the account be made up on the one principle, or on the other, the mortgage has not been redeemed.

The appeal is dismissed accordingly.

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The 12th March, 1851.

Present : H. LUSHINGTON, Judge.

CASE No. 61 OF 1851. { *Special appeal from the decision of Doobé Jowala Pershad, Additional Principal Sudder Ameen of Azimgurh, dated 10th December 1850.*

SHEIKH ZEEAOOLLAH, (*Defendant*), *Appellant*,
versus

SHEIKH HINGOO, (*Plaintiff*), *Respondent*.

THE plaintiff sues to render absolute a conditional sale made to him by the defendants, Sheikh Zeeaoollah and Sheikh Madoo, (deceased) of a four-anna share in mouzah Goordhunnah, under date Bhadoon Budy 2nd, 1244 Fuslee.

The defendant denies the execution of the bond, and, amongst other objections, he urges the plea, that Sheikh Madhoo at the date of the alleged execution of the deed of sale was a minor, and, therefore, had no power to alienate the property.

The plea was urged in the *juwab-davee* and in the petition of appeal presented to the Principal Sudder Ameen, but neither of those Courts has disposed of it. The appellant now, again, in special appeal, urges, that the plea has not been adjudicated; and as this appears to be the case, the decisions of the lower Courts are annulled, and the case is remanded to the file of the Moonsiff, that he may pass a fresh decision, after disposing of all the pleas advanced by the parties.

The 15th March, 1851.

Present : A. W. BEGBIE, Judge.

CASE No. 221 OF 1850. { *Special appeal from the decision of H. Lushington, Esq., Judge of Mooradabad, dated 2nd January 1849.*

BELASS RAI AND MUSSUMAT SAHIB KUOR, (*Defendants*),
Appellants,
versus

KHUWANEE SINGH AND GHOSSEE RAM, (*Plaintiffs*), *Respondents*.

THIS case will be found reported at pages 2—6 of the printed decisions for zillah Mooradabad for the year 1849.

A special appeal was admitted by a former Judge of this Court, "to determine whether the suit should not, in conformity with established precedents, have been remanded by the Judge to the Principal Sudder Ameen for decision on the merits."

The precedents, agreeably to which this certificate was granted, are specified by the certifying Judge, viz. the cases of Sher Ali and others, appellants, *versus* Imam Ali and others, respondents, decided on the 27th March 1849, and Sheikh Zeeaoollah and others, appellants, *versus* Hyat Mohumed, respondent, decided on the 26th December 1849. But I find a *third* precedent of the same year, as the two above quoted, viz. the case of Him-mochul Pandé and others, appellants, *versus* Madho Pandé and others, respondents, disposed of on the 1st March 1849, which shews that no *general* rule obtains for the remand of suits to be tried on the merits where the order of the lower Court, dismissing them under the law of limitation, has been overruled by the appellate Court. Whether a suit should be remanded or not, must depend on the circumstances of each case, and I am of opinion, that there is no necessity for remanding the present case, in which the *right* to possession is so intimately connected with the *fact* of possession, that the determination of the latter point necessarily involves that of the former. The Principal Sudder Ameen was of opinion, that the plaintiffs never had possession of the property claimed by them; and from the continued adverse possession of the defendants, he inferred, that the plaintiffs had no *right* to possession. The Judge, on the other hand, considered, that the fact of the plaintiffs' possession, within twelve years antecedent to the institution of their suit, was established. He says, "they (the *punchayet*) declare, unanimously, that plaintiffs had held possession of their *zemindaree rights* up to the end of the English settlement, and that they were dispossessed at the *ninth*." The Judge accepts this decision, which he declares to be "of more value than the evidence of any number of witnesses taken in the usual manner." Were this suit to be remanded to the Principal Sudder Ameen for retrial on the *merits*, it would be tantamount to dictating to him the revised judgment to be passed; for the Judge has determined both the *right* and the *actual possession* in favor of the plaintiffs. The Principal Sudder Ameen would have to *unsay* all that he had previously said, in opposition to his own judgment, a position quite incompatible with the independence of the judicial character. I am quite ready to admit that in many cases, wherein the suit has been held by the lower Court to be barred by the law of limitations, and that finding has been overruled by the appellate Court, it may be advisable, indeed absolutely necessary, to remand the suit for retrial on its merits, *e. g.*, in cases wherein the Court

of first instance has not allowed the deduction of the period during which a nonsuited case may have been pending or for minority; or when it may have overlooked the exception in favor of mortgagers and depositions, contained in Clause 4, Section 3, Regulation II. of 1805, and in similar instances, which will suggest themselves to experienced judicial officers, and therefore need not be enumerated.

For the reasons above specified, I dismiss this appeal, with costs.

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The 24th March, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 203 of 1850. { *Special appeal from the decision of*
J. Lean, Esq., Offg. Judge of Moor-
dabad, dated 18th June 1850.

BULDEO DASS AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

HURKISSEN, (*Defendant*), *Respondent.*

THE printed decisions for June 1850 give the particulars of this case.

A special appeal was allowed to try, whether the Judge has not acted in opposition to judicial usage in dismissing the *entire* claim of the plaintiff, notwithstanding that one of the defendants (Hurkissen) partially admitted the justness of the claim.

The Court are of opinion that the Judge has deviated from established judicial practice in refusing to pass a decree in favor of the plaintiffs for the sum which the defendant Hurkissen admitted to be due. They accordingly modify the judgment of the Zillah Court, and decree to the plaintiff the above amount, with costs in proportion.

The 24th March, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 4 OF 1851. { *Special appeal from the decision of*
Doobé Jowala Pershad, Principal
Sudder Ameen of Benares, dated 4th
July 1850.

KASIM ALI KHAN, (*Plaintiff*), *Appellant*,

versus

IKRAM ALI KHAN, (*Defendant*), *Respondent*.

THE plaintiff sued in the lower Courts to set aside a sale under the following circumstances. At the settlement a boundary dispute existed between the zemindars of mouzah Beera and mouzah Nundwa, and a parcel of land, (225 beegahs) known under the name of mouzah Islampore, which had previously formed part of mouzah Beera, was severed from Beera, and incorporated with mouzah Nundwa. The zemindars of Beera sued in the Courts to get it re-attached to their village, obtained a decree in 1837, and duly executed it. A sum of Rs. 67, the estimated jumma on the land so adjudged, was taken off from the jumma of Nundwa, and added to that of Beera. By this increase, the jumma of Beera, formerly Rs. 369, became Rs. 436. Sometime afterwards, the right and interest, in Beera, of Asud Ali and Surufraz Khan, zemindars of that village, calculated at a five-anna share, were sold by public auction, at the instance of the present defendant, who held a decree against them, and were purchased by the present plaintiff.

The same decreeholder, viz. the defendant Ikram Ali Khan, then brought about the sale of what he termed the rights of Asud Ali and Surufraz Khan in the recovered property, and purchased them himself. The object of the action is to set aside this second sale, the plaintiff contending that the entire rights of Asud Ali and Surufraz Khan, in the whole of mouzah Beera, without any reservation, on account of the tract of Islampore, were bought by himself at the first sale.

The Moonsiff and the Principal Sudder Ameen recognized the validity of the second sale, and dismissed the plaintiff's claim.

A special appeal was allowed, "to try whether the lower Courts were not in error in holding that the entire rights of Asud Ali and Surufraz Khan had not been previously disposed of at the public sale at which the plaintiff was purchaser.

The Court are of opinion, that the decisions both of the Moon-siff and Principal Sudder Ameen are erroneous. It is true that the sale notice, in conformity to which the first sale was held, indicated for sale the right and interest of Asud Ali and Surufraz Khan in mouzah Beera, *of which the jumma is Rs. 369.* But the Court cannot regard this as anything more than a mistake on the part of the Collector, since, at that time, the real jumma of Beera was, by reason of the increase effected by the recovered land, Rs. 486, and it is not competent to a Collector, on bringing to sale the interest of a sharer, to sever off from the mouzah a tract of land, and to declare that the interest sold does not embrace the sale of any interest in the severed tract. Had no dispute existed between the plaintiff and defendant, and the plaintiff had purchased the rights of certain sharers in a mouzah of which the jumma might be found to have been, through accident, incorrectly set down in the sale papers, it could be no matter of question whatever, whether, in consequence of such mistake, the plaintiff had or had not bought the entire rights of those sharers. Upon these considerations, the Court annul the judgments of both the lower Courts, and pass a decree in the plaintiff's favor.

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The 31st March, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

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CASE No. 66 OF 1850. { *Special appeal from the decision of*
J. P. Gubbins, Esq., Judge of Dehlie,
dated 17th July, 1850.

COLLECTOR OF GOORGOAN, (*Defendant*), *Appellant,*

versus

MUNGNEE AND OTHERS, (*Plaintiffs*), *Respondents.*

For the particulars of this decision see pages 103 to 105 of the printed decision for zillah Dehlie for the past year.

A special appeal was admitted "to determine, 1st, whether the Judge had not acted irregularly in adjudicating on a point not set forth in the pleadings of the parties, such a proceeding being in contravention of the rule laid down in the Circular Order No. 33 under date 13th September 1843; 2ndly, on the ground of the present decision of the Judge being inconsistent with a former judgment passed by him in a similar case."

The Court are unanimous in opinion, that the Judge was not competent to pass a decree in favor of the plaintiffs on the ground

assigned by him, viz. that the Government had not delegated the power of confiscation to the Sudder Board of Revenue. The plaintiffs themselves do not urge this objection. They merely plead, that the confiscation was not made by the Collector in conformity with the rules in force in the Dehli territory, which they state to be, that the sanction of the Sudder Board, both prior to, and subsequent to, the act of confiscation, was essential, but which sanction had not been applied for or obtained by the Collector. The Principal Sudder Ameen very properly confined his judgment to this, the only point at issue, according to the pleadings of the parties, and having decided that the sanction of the Sudder Board *had* been obtained, dismissed the suit, and the Judge would have done well had he followed this course and not gone out of his way to find reason for objecting to the Collector's proceedings, which had not occurred to the parties themselves. It was the more necessary to adhere to the established rules of pleading in this case, when it is allowed by the Judge himself that in regard to the Dehlie territory, the regulations have not to this day been fully introduced there.

The Court annul the decision of the Judge, and remand the suit, in order that he may pass a fresh decision with reference to the foregoing observations. The suit being remanded on the first point specified in the certificate of special appeal, it is unnecessary to record any opinion on the second.

The 31st March, 1851.

Present : { A. W. BEGGIE, } *Judges,*
H. LUSHINGTON, }
H. W. DEANE, } *Offg. Judge.*

CASE No. 67 OF 1850. { *Special appeal from the decision of
J. P. Gubbins, Esq., Judge of Dehlie,
dated 17th July, 1849.*

SUNEE KHAN AND OTHERS, (Defendants), Appellants,
versus

MUNGNEE AND OTHERS, (*Plaintiffs*), Respondents.

THIS is a separate special appeal in the case No. 66, preferred by the new occupants of the village who were located by the Collector in the place of the plaintiffs. The grounds of appeal are precisely the same as in the preceding case, and for the reasons therein recorded, the decision of the Judge is annulled, and the case remanded.

The 31st March, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 68 OF 1850. { *Special appeal from the decision of*
J. P. Gubbins, Esq., Judge of Dehlie,
dated 20th July 1850.

THE COLLECTOR OF GOORGAON, (*Defendant*), *Appellant,*
versus

BHEEM SINGH AND OTHERS, (*Plaintiffs*), *Respondents.*

THIS case will be found reported at page 106 of the printed decisions for zillah Dehlie for the past year. With the exception of the cause of action having arisen in a different village, the circumstances are precisely the same as those in the two cases, Nos. 66 and 67, this day decided, and for the reasons recorded in case No. 66, the decision of the Judge is annulled, and the case remanded.

The 31st March, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 11 OF 1851. { *Special appeal from the decision of*
S. S. Brown, Esq., Judge of Goruck-
pore, dated 30th October 1849.

KALKA PANDE AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

MUSSUMAT ROOKMA AND OTHERS, (*Defendants*), *Respondents.*

THIS case will be found reported at pages 222 to 224 of the printed decisions for zillah Goruckpore for the year 1849.

A special appeal was granted "to determine, whether the facts found by the Judge are sufficient to establish a proprietary right in behalf of the appellants; and whether his decision is consistent with previous decisions of this Court."

The above certificate was granted because the decision appealed from appeared to involve a question of "law, usage or practice, upon which there may be reasonable doubts."*

* Section 1, Act III. of 1843.

The Court are unanimously of opinion that no sufficient reason is shown by the appellants for interfering with the decision of the Judge. The main argument of the appellants is, that the present decision of the Judge is opposed to a decision of this Court in a parallel case, that of Bhyro Dutt Pandé and Mittur Dutt Pandé, appellants, *versus* Ram Lall Pandé and others, respondents, under date 9th August 1847, connected with this same village. But the Court cannot admit the justice of this statement. In the case of the 9th August 1847, the Court assumed the facts, as found by the Judge, which were held to be incompatible with dispossession of the plaintiffs from their *zemindaree* rights. In the present case, the Court must also take the facts as found by the Judge, who has recorded his opinion, that the only fact which the plaintiffs have established is their possession of *seer* land from 1834 to the year of the resumption of the *maaftee* tenure in 1842, and that the only privilege enjoyed by them in respect to other cultivators was a reduction of four annas in the village rates, and that they did not share in the *julkur* and *bunkur* proceeds. This is a very different finding from that in the case of 1847, in which the Judge ruled, that the plaintiffs had enjoyed not only *seer* lands, but also *malikana*, and had never paid rent as *ryots*. It does not follow, that because *some* of the claimants to the *zemindaree* right in the particular village have obtained a decree, that *all* persons preferring similar claims are entitled to decrees also. Each case must be determined on its own merits. It must be presumed, that the successful litigants were more successful than their neighbours in resisting the encroachments on their rights on the part of the defendants. *All may* have been originally in the same position, but *all* may not have been able to maintain that position. The narratives contained in the respective petitions of plaint may be *identical*, but if the zillah Judge draws, from the evidence adduced, inferences opposed to those adopted by his predecessor, this Court cannot interfere with his decision. To do so would be to treat this case as a *regular* instead of a *special* appeal.

The appeal is accordingly dismissed, with costs. But as it appears to the Court that the defendants have unnecessarily employed three vakeels and filed three distinct replies, apparently, with no other object than to harass their opponents, the Court will not charge the plaintiffs with the costs of more than one vakeel.



The 31st March, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 169 OF 1851. { *Special appeal from the decision of Moulvee Mohumed Abdoor Ruhman Khan, Officiating Principal Sudder Ameen of Benares, dated 25th September 1850.*

BABOO HURREE DASS, (*Defendant*), *Appellant*,
versus

ABDOOLLAH AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS was a suit instituted in the Court of the Moonsiff of Juggutgunge, to enforce the opening of a road to a mosque, which the defendants, as purchasers of the *bagh* in which it was situated, had closed: the damages being laid at Rs. 119-9-6. The Moonsiff gave a decree in favor of the plaintiff, assessing the damages, however, at the amount of Rs. 9-9-6, with costs in proportion to the amount decreed and dismissed, but omitting to specify at the foot of the decree the amount of costs to be paid by the defendant. This decision was upheld on appeal by the officiating Principal Sudder Ameen.

A special appeal was admitted "to determine, whether the decrees of the lower Courts are not faulty, inasmuch as the memorandum at the foot of the decrees does not contain any specification of the proportion of costs to be paid by the parties under the decree, as directed by paragraph 10 of the Circular Order Sudder Dewanny Adawlut of the 12th February 1847."

The Moonsiff and Principal Sudder Ameen are clearly chargeable with an oversight, in having omitted to specify at the foot of their decrees the amount of costs chargeable to each party, respectively, as required by the Circular Order referred to in the certificate: as the decrees now stand, the defendants might be called upon to pay the whole of the plaintiffs' costs, although the decree expressly declares that the defendant should be charged only with costs in proportion to the amount decreed. I remand the case to the Principal Sudder Ameen and Moonsiff, in order that the error now pointed out may be rectified.



The 31st March, 1851.

Present: { A. W. BEGGIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE No. 166 OF 1849. { *Regular appeal from the decision of
Jumeel-oolden Khan, Principal Sud-
der Ameen of Benares, dated 13th
February 1849.*

MOHUMED HOOSSEIN AND AHMUD HOOSSEIN, (*Defendants*),
Appellants,
versus

HURRUCK CHUND, (*Plaintiff*), *Respondent.*

THIS claim is advanced for the recovery of certain balances of an amount formerly decreed to the plaintiff by the Benares Court. The plaintiff obtained a decree on deed of mortgage in the Court at Benares against Sadhoo Lall and Brij Ruttun Dass, and put it in execution. He represented that those defendants were possessed of property in the Azimgurh zillah, in the hands of lessees, and prayed that an order be issued compelling the lessees to execute an agreement, that they would pay to the plaintiff instead of Sadhoo Lall a sum of Rs. 600 per annum, which Sadhoo Lall had to receive from the lessees: an order was made accordingly in March 1837. The rights of Sadhoo Lall and Brij Ruttun Dass were afterwards sold, and bought by the ancestors of the present defendants. The lessees still maintained possession, and the plaintiff, it is said, still received his instalments from the property as before, but at length, after frequent disputes between the lessees and the auction purchasers, the latter succeeded in establishing themselves to the exclusion of the lessees. The plaintiff applied to the Court at Benares for an order to the auction purchasers to continue to pay the instalments, and obtained an order to that effect, which, however, was reversed in appeal by the Sudder Court, on the ground that the right course of proceeding would be a regular suit against the auction purchasers. A regular suit is now brought in the Benares Court.

The main point raised in appeal, and the only one with which this Court has to deal, is, whether or not the plaintiff must be nonsuited, in consequence of his having preferred his claim in a Court not having jurisdiction to try it. The plaintiff contends, indeed, that his cause of action is the order of 13th March 1837, by the Benares Court, issued to the lessees of the original

defendants, Sadhoo Lall and Brij Ruttun Dass. But the Court think otherwise. The property, the proceeds of which it is sought to realize, is situated in the Azimgurh zillah, the defendants reside there, and the cause of action has been rightly stated by the appellants, as it appears to the Court, to be the refusal of the defendants to make good the instalments demanded of them.

For the above reasons, the judgment of the Court below is annulled, and the plaintiff nonsuited.

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The 31st March, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

CASES NOS. 186 AND 196 OF 1850. { *Special appeal from the decision of Tusud-dooq Hoossein Khan, Principal Sudder Ameen of Azimgurh, dated 21st May 1850.*

BIKKURMAHJEET SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

KOONJUN RAI, (*Plaintiff*), *Respondent*.

AND

GOORDIAL SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

KOONJUN RAI, (*Plaintiff*), *Respondent*.

THE plaintiff sued to obtain possession, under a deed of sale, of mouzah Moongessur in zillah Azimgurh. His claim was dismissed by the Court of first instance, the Court holding the deed to be forged.

The Principal Sudder Ameen, in appeal, likewise regarded the deed to be not genuine, but, nevertheless, awarded to the Plaintiff, against certain of the defendants, a twelve-anna share in the mouzah.

Two special appeals were preferred. In the case of Bikkurmahjeet Singh and others, a special appeal was allowed to try whether the Principal Sudder Ameen should have decreed a claim founded on a *byenamah*, which he admitted to be forged.

In the case of Goordial Singh and others, a special appeal was granted to try, whether the Principal Sudder Ameen was competent to give the plaintiff a partial decree on the strength of a deed, which the Principal Sudder Ameen himself considered a forgery.

2ndly. Whether the Principal Sudder Ameen was justified in awarding, an application for transfer made to the Collector, in the 1848, indeed, of three of the defendants, but which in the pleadings in the suit is wholly denied by those defendants, as tantamount to a confession of judgment recorded in his own Court, in the absence of proof that the three defendants made such application.

3rdly. Whether, supposing the application aforesaid can be viewed in the light of a confession of judgment, it can be made to affect other persons than those in whose names it was given in.

As respects the second and third points of the certificate, in the case of Goordial Singh and others, the Court are not disposed to hold that the Principal Sudder Ameen based his decision on what he considered a confession of judgment, though the not-very-precise terms in which the decree is drawn up are to some extent calculated to afford that impression. The Court find the Principal Sudder Ameen to declare that while the deed of sale produced before him must be rejected as not genuine, there is yet ample proof against some of the defendants, independently of the deed, of the alienation in his favor pleaded by the plaintiff. Against a declaration such as this every rule of right reasoning rebels. To hold the deed of sale to be a forgery is necessarily to pronounce against the fact of alienation. No accumulation of proof, therefore, of whatever kind, or from whatever source drawn, can show that to be a fact which has already been found to be not a fact.

The judgment of the Principal Sudder Ameen is annulled, and the claim of the plaintiff is dismissed.



The 1st April, 1851.

Present: { A. W. BEGGIE,
H. LUSHINGTON, } *Judges.*

CASE No. 39 OF 1850. { *Regular appeal from the decision of
J. P. Gubbins, Esq., Judge of Dehlie,
dated 3rd January 1850.*

AMEER BEG AND OTHERS, (*Plaintiffs*), *Appellants*,

versus

BEEBEE JUBBUN JAN *alias* MRS. FOY, (*Defendant*), *Respondent*.

THIS case will be found reported at page 2 of the printed decisions for Zillah Dehlie for the month of January 1850. As that decision does not contain a sufficiently full statement of the nature of the pleadings, it is necessary to supply the deficiency, in order that the grounds on which the Court's present decision is based may be made apparent.

The plaintiffs assert that in the reign of Alumgeer 2nd, a person by name Abdool Kureem Khan erected a mosque in the neighbourhood of Dureagunge, that the same was for a long period used as a place of worship; that in 1814, Mr. Foy, the husband of the defendant, whose house adjoined the mosque, took forcible possession of the building, notwithstanding which prayers continued to be read there till 1824, by one Azeem, as *mootuwalee*; that in 1825, Mr. Foy took possession of the entire building, and, in 1827, surrounded it on all sides by a wall, and the reading of prayers was put a stop to; that the defendant can show no good title under which she holds possession of the mosque, her only plea being, that it was *lawaris* when taken possession of, and converted into a residence; that the mosque in question is *wukf*, and cannot be converted to any other use than that for which it was erected, and that although defendant, and those from whom she derived possession, have been in the occupancy for more than twelve years, still, as the original acquisition was made by violent and unjust means, this suit, brought by plaintiffs on behalf of the Mussulman population, is cognizable under the provisions of Section 3, Regulation II. of 1805.

The defendant replied that the statement of the plaintiffs, as to the violent and unjust acquisition of the building, was untrue; that Mr. Foy never had possession of it, nor had defendant herself any proprietary title to it, that the proprietor had made it over to her temporarily, but that she did not reside in it; that the real facts are as follows. That when the Government formed the Cantonment at Dureagunge, the ground and the mosque were

assigned to Lieutenant Newton to build upon, who took possession accordingly, and erected several rooms and a kitchen; that in 1810, Lieutenant Newton sold the property to Mr. LeMaistre for Rs. 5,000, who, dying, was succeeded by his partner Mr. Benson, who, on his death, left it by will to Mr. Field, who sold it to Mr. Conductor Hauly, (defendant's first husband or protector), on the 8th November 1821, by whom additions were made to it, and the mosque itself converted into a kitchen; and that during the whole of this period, no religious worship had ever been conducted on the premises; that Mr. Hauly died about twenty-five years ago, and was succeeded by his son, who is at present in the Jalkunder Doab; that on the death of Mr. Hauly, defendant was married (secondly) to Mr. Foy, but that neither her late husband or herself had any proprietary right in the property; that according to plaintiffs' own statement, their suit was barred by the law of limitation, the building having been for thirty-eight years disused as a place of worship.

When the case was first heard by the Judge, he dismissed the claim, on the ground that, as the building was situated within Cantonments, it was not cognizable by the Civil Courts. On a summary appeal to this Court, this decision was annulled, and the Judge was directed to try the case, in the ordinary form, on its merits. The Judge accordingly proceeded, very properly, under the provisions of Section 3, Regulation II. of 1805, to call on the parties to produce their evidence, *pro* and *con*, as to the alleged violent and unjust acquisition of the property by the first tenant. The plaintiffs have failed to produce any evidence in support of their statement; they merely filed several decrees (including one of Her Majesty's Privy Council), with the object of showing that where violent possession can be proved, the lapse of twelve years is no bar to a suit, a position which of course is not denied, but these papers do not in any way establish the fact, that the possession of the defendant, or those whom she represents, was in this instance violent, fraudulent or unjust. On the other hand, the defendant has produced documentary evidence as well as oral, in support of her plea, viz., the title deeds for the property, and several witnesses, who depose to the fact of the building having for a very long period been used exclusively as a private residence.

Such being the circumstances of this case, there can be no doubt that the Judge has now very properly dismissed the suit, as barred by the law of limitation. But the Court cannot avoid noticing the erroneous view taken by the Judge of the general question as to jurisdiction of the Civil Courts in Cantonments. This Court can by no means assent to the doctrine laid down by the Judge, that *all* land situate within a Military Cantonment

is necessarily the property of Government. From the tenor of Section 26, Regulation XX. of 1810, it is quite clear that the Government itself does not claim the proprietary right in -all the land situate in Cantonments. That Section admits that there may be a *private* property in lands or houses so situated; and positively prohibits Commanding Officers from dispossessing such proprietors, and their interference regarding the tenure or occupation of houses, shops, &c., is restricted to buildings "situated upon such ground *as belongs to Government*."

The appeal is dismissed, with costs.

The 2nd April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges.*
H. W. DEANE, *Offg. Judge.*

CASE NO. 44 OF 1851. { *Special appeal from the decision of*
G. Blunt, Esq., Judge of Allygurh,
dated 21st September 1850.

SEWA RAM, (*Defendant*), *Appellant*,

versus

MOHUMED KHAN ZEMAN KHAN, (*Plaintiff*), *Respondent*.

THE particulars of this case are to be found in the printed English decision of the Judge at the usual place.

From that it appears that Sewa Ram, a jât, and ex-sharer of mouzah Bijowlee, now belonging to the plaintiff Khan Zeman Khan, did on the 30th March 1829, present to the Magistrate a petition, containing the expressions which constitute the alleged libel. The petitioner was fined by the Deputy Magistrate for preferring a false complaint, and the order was reversed in appeal by the Magistrate, who thought it sufficient to take recognizances from certain parties to keep the peace. The plaintiff then brought this action for damages, and obtained a decree for Rs. 5,000 in the Court of the Principal Sudder Ameen, which amount was lowered in appeal to 500. The grounds of these decisions are to be found in the Judge's decree.

A special appeal was admitted to try, whether, under the circumstances, an action for damages would lie.

The majority of the Court are of opinion that the action will not lie. The principles upon which suits for defamation of character can be heard and determined in our Courts have

not yet been well defined; and without neglecting altogether the well digested system of the English law, the Court cannot be bound by it. They come therefore to the conclusion that cases of this kind must still be disposed of on general principles of equity, and with reference to the merits of each particular case.

The petition of Sewa Ram was very objectionable, and the petitioner undoubtedly subjected himself to the penalties prescribed for false complaints, and for contempts of Court. But after a careful perusal of the document itself, which is purposely not entered in this decision, lest the spirit should evaporate in the translation, the Court do not believe either that Khan Zeman Khan sustained any injury from the publication, or, that it was at all probable that he should. The Judge, in referring to the expressions in the libel more than once uses the term "murder," which conveys an impression very different from that conveyed by the petition itself. When Sewa Ram wrote *murwana* and *mardalna* in his petition, it may reasonably be doubted whether he intended to bring a deliberate charge of attempt to commit wilful murder. It is also to be borne in mind that great licence has been permitted in this respect by our Courts, a licence which should be restrained by the presiding Officer, but not by actions for damages: not yet at all events, and not until the people have been taught to expect such novel consequences of acts which they have long been allowed to commit with impunity. The relative position of the parties is another consideration which weighs with the Court in refusing damages to Khan Zeman Khan. He has purchased the defendant's lands; he is the talooquadar, and Sewa Ram the ex-zeminder still residing in his hereditary village. These facts may not appear to strangers to bear much upon the case, but they speak volumes to those who are acquainted with the present condition of the North Western Provinces. The Court feel convinced that if talooquaders were allowed to bring actions for damages on account of every intemperate expression uttered by dispossessed putteedars, the Courts would soon be filled with vexatious suits, and a fresh instrument of oppression would be placed in the hands of those who might choose to avail themselves of it. It may be quite true, as the Judge observes, that the plaintiff has not instituted this suit "for the purpose of making a profit of the defendant by recovering damages;" but since the plaintiff, as also observed by the Judge, "has not suffered any actual injury from the libellous expressions," the Court, with reference to the state of society in these Provinces, are unable to conceive with what good object this suit can have been brought. The talooquadar has not suffered in any way, nor was it likely that he should have suffered, and whatever malice or impertinence there may have been in Sewa Ram's petition, would have been suitably punished by a fine. This

* Hedger, Appellant,
versus
 Maharanee Kumul Koomaree,
 Respondent.

view of the case is moreover in conformity with a precedent* of the Sudder Dewanny Adawlut, 22d April 1841, when it was held that "defamatory and

libellous expressions, when used by a party in the course of a judicial proceeding, are not actionable, though punishable as a contempt by the Court in which they are used." If this precedent be accepted by the Court, it is of itself a sufficient ground for dismissing the claim of the plaintiff.

On referring to the not very numerous precedents reported in the Law Books, the Court observe that whenever damages have been given, the libellous expressions were such as were likely to cause peculiar injury to the complaining party.

A Clergyman obtained a verdict when his morality was impugned. A Principal Sudder Ameen was considered entitled to recover damages when charged with corruption. A Post Master could not with impunity be accused of clandestinely opening letters. And, contrary to the practice of the English Courts, a female has recovered damages from those who calumniated her. The injury or probability of injury in these cases was very great; but there is nothing in the case before the Court to show that Khan Zuman Khan suffered, or might have suffered, peculiarly or excessively, from the libel of Sewa Ram.

The Court annul the decision of the Zillah Judge, and dismiss the claim of the plaintiff.

Present: A. W. BEGBIE, Judge.

I am inclined to take a different view of this case. The precedent of the Sudder Dewanny Adawlut of the 22d April 1841, quoted by my colleagues, is just exactly in point. The accusation brought by Sewa Ram against the plaintiff is something more than "defamatory and libellous expressions, when used by a party in the course of judicial proceedings." The petition of Sewa Ram was nothing less than a "malicious prosecution," the remedy for which is a Civil suit for damages. This principle, viz. the right of a party falsely accused to sue for damages is expressly recognized in Clause 12, Section 12, Regulation XII. of 1803, in regard to native ministerial officers, and there seems no reason to suppose that it was the intention of the Legislature to allow to that class of persons a privilege not claimable by the community at large. By the English law, an action may lie for a false and malicious prosecution even though it miscarry. "An action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had: as, if it be rejected by the grand jury, or be *coram non judice*, or be insuffi-

ciently drawn. For it is not the *danger* of the plaintiff, but the scandal, vexation and expence upon which this action is founded." I cannot conceive a stronger ground for an action of defamation than is shown in the present case. The defendant deliberately presented a petition on stamp paper to the Magistrate, charging the plaintiff with employing persons to murder him, and he afterwards attested the petition on oath; although the Magistrate did not believe the accusation, it was not on this account the less libellous. The state of society in this country is such as not to place the charge beyond the bounds of probability. It is well known that influential men are but too apt to take the law into their own hands, and the removal, by the hands of hired assassins, of an obnoxious individual, at the bidding of a powerful enemy, is not an event calculated to excite astonishment in this country. Had the fine imposed by the Deputy Magistrate not been re-

mitted, there would still have been a sufficient cause of action,* but as the offender has been allowed to escape unpunished by the Criminal authorities, it is the more necessary that he should be visited with the penalties of a Civil action. A few such examples would very soon put a stop to the too prevalent practice of false accusation. I find a precedent in the *Sudder Dewanny Adawlut Select Report*, 5th May 1845, volume VII. page 204, in which damages were awarded against a party for having falsely charged the plaintiff with dacoitee. I feel myself therefore compelled to record my dissent from my colleagues in this case, and to express my opinion that the petition presented by the defendant to the Magistrate was libellous, and calculated to harass and injure the plaintiff in public estimation, and that, as such, it was justly made the ground of a Civil action for damages.

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The 2nd April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges,
H. W. DEANE, Offg. Judge.

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CASE No. 242 OF 1850. { Special appeal from the decision of
S. Fraser, Esq., Judge of Bareilly,
dated 17th August 1850.

MUSSUMAT KURRUM BEEBEE, (Plaintiff), Appellant,
versus

HULEEM KHAN AND OTHERS, (Defendants), Respondents.

THIS case will be found among the printed decisions of the Zillah Courts for August 1850.

A special appeal was granted to try "whether the Judge has not erred in nonsuiting the plaintiff, on the ground that it was not competent to the Sudder Ameen to admit a supplemental plaint, with reference to the precedent of this Court of 29th June 1850, Gholam Qadir Khan and others, appellants."

The point at issue is disposed of by the precedent above quoted, which contains a lucid exposition of the Court's views on this subject. It was held by a full bench, for reasons recorded at length, that an Officer of the grade of Sudder Ameen is competent under the law to receive a supplemental plaint.

The decision of the Zillah Court is accordingly set aside, and the suit is remanded to the Judge's file for trial on its merits.

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The 2nd April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

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CASE No. 47 OF 1850. { *Regular appeal from the decision of*
Moulvee Ahmud Hussun Khan, Prin-
cipal Sudder Ameen of Mooradabad,
dated 7th January 1850.

DOWLUT RAM AND SALIG RAM, (*Plaintiffs*), *Appellants,*
versus

CHOWDREE HUBEEB-OOLLAH, (*Defendant*), *Respondent.*

THE claim of the plaintiffs is founded on a bond for Rs. 8,000, dated 22nd July 1845, the execution of which is not denied by the defendant. The objections raised to the demand were, that the whole of the accounts of the parties should be gone into before a decree could be given on a deed which referred only to a portion of them; that by suing on the bond only, the plaintiff would in reality obtain illegal interest; and that a certain sum of Rs. 658 ought, for reasons alleged, to be allowed to the defendant.

The plaintiff consented to the deduction of the item of Rs. 658, concerning which it will be unnecessary to say any thing more.

This suit was made over for arbitration with the consent of the parties to a very respectable banker of Mooradabad, who, probably acquiescing in the defendant's opinion, that the whole of the account should be gone into if the object in view was a fair adjustment of all money dealings between the parties, did make a complete investigation, and gave into Court an award against the defendant for Rs. 20,070.

No sooner however had this result of the desired enquiry into the whole account been made the basis of the Court's decree, than the defendant preferred an appeal to this Court, on the ground that the arbitrator had exceeded his powers, and that the Court had decreed more than the plaintiff had claimed. The plea was good, and the case was unavoidably remanded to the Court of the Principal Sudder Ameen under date 4th June 1849.

On rehearing the case, the Principal Sudder Ameen observed "that the sum of Rs. 1,086-11-9 appeared in the account as interest on *malikana*, and of the nature of compound interest."

He therefore deducted this item, as well as the Rs. 658 above alluded to, and gave a decree for the remainder.

From this decision both parties appeal. The plaintiff re-asserts his claim to the full amount covered by the bond, excepting always the Rs. 658, and submits that, under the provisions of Section 6, Regulation XXIV. of 1803, the Court cannot enquire into the nature of the several items which compose the sum covered by the bond. The Court think with him that the execution of the bond renders the defendant legally responsible for the sum entered therein, and they therefore so far modify the decision of the lower Court as to decree to the plaintiff the sum claimed by him under the bond, deducting only the sum of Rs. 658, the claim to which has been withdrawn by the plaintiff.

The 2nd April, 1851.

Present: H. LUSHINGTON, Judge.

CASE No. 57 OF 1850.	{	<i>Regular appeal from the decision of Moulvee Ahmud Hussun Khan, Prin- cipal Sudder Ameen of Mooradabad, dated 7th January 1850.</i>
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CHOWDHREE HUBEEB-OOLAH, (*Defendant*), *Appellant*,
versus

DOWLUT RAM AND SALIG RAM, (*Plaintiffs*), *Respondents*.

SEE the foregoing case. The defendant appeals on the ground that the whole of the accounts between himself and the plaintiffs should be adjusted before the claim under the bond can be heard. This is of course an error: but, moreover, it is very clear, that the only object of the defendant is to evade the payment of his debts; for when the arbitrator *did* go into the whole of the accounts and gave an award, this defendant appealed from the decision founded thereupon, and procured its reversal, on the

ground that the Court could not adjudicate upon matters not laid before it by the parties to the suit. He will not accept a decision founded on the accounts at large, nor a decision founded on the bond alone.

The appeal is dismissed.

The 2nd April, 1851.

Present: A. W. BEGGIE, Judge.

CASE NO. 70 OF 1851. { *Special appeal from the decision of
A. C. Heyland, Esq., Judge of Gha-
zee-pore, dated 11th January 1850.*

RAM SEWUK, *tewarree, (Defendant), Appellant,*
versus

ROOPA RAI AND OTHERS, *(Plaintiffs), Respondents.*

THIS case will be found reported at pages 8 to 11 of the printed decisions for Zillah Ghazee-pore for the past year.

A special appeal is granted, "to determine whether the Judge's decision is not imperfect, inasmuch as he has omitted to notice one material objection urged by the defendant to the suit."

The Court find, that amongst the pleas urged by the defendant is the following. That the present suit is brought to set aside an auction sale of an eight-anna share, or *half* the estate, stated to have been effected on the 20th May 1848, whereas, on the date in question, the portion of the estate, put up to auction and purchased by the defendant, was only a *six-anna* share, the remaining *two annas*, "the property of the plaintiffs, Bhowun Rai, Bukht Rai and Hemraj Rai," having been *previously* and *separately* purchased by the defendant at auction in execution of another decree, and that the aforesaid plaintiffs were therefore not at liberty to associate themselves with the other plaintiffs, the proprietors of the remaining six annas, and to institute a *joint* suit for the reversal of two distinct sales. This very important plea has been unnoticed, evidently through inadvertence, by the Judge, and although I have no hesitation in recording my concurrence in the opinion expressed by him on all the other points in the case, it is indispensably necessary that an opinion should be recorded on the plea above adverted to. I accordingly annul the decision of the Judge, and remand the suit, in order that a fresh judgment may be passed with reference to the foregoing observations.

The 2nd April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } *Judges,*
H. W. DEANE, *Offg. Judge.*

CASE NO. 189 OF 1848. { *Regular appeal from the decision of*
Syed Mohumed Yusoof Hussun Khan,
Principal Sudder Ameen of Futtehpore,
dated 19th August 1848.

HUR SUHAI AND RAM SUHAI, (*Plaintiffs*), *Appellants,*
versus

MOOZUFFER HOOSSEIN KHAN AND SOORJUR SINGH, (*Defendants*),
Respondents.

THIS was a suit to recover possession of beegahs 397-1 of land said to belong to mouzah Seersee, of which village the plaintiffs are the zemindars, but which, at the boundary survey, had been wrongfully included within the limits of mouzah Buhadurpore Kagma, the defendants' village. The Principal Sudder Ameen decreed in favor of the plaintiffs against the respondents and three other persons, viz., Dureao Singh, Nirmul Singh and Goshaeen Deen, who had been made co-defendants by the plaintiffs, but he exempted the respondents from costs, on the ground that the boundary survey, (the cause of action), had been effected during the incumbency of Dureao Singh and Nirmul Singh, and the disputed land included in the village of Buhadurpore Kagma by their contrivance, and the Principal Sudder Ameen therefore held that Dureao Singh and Nirmul Singh only were equitably chargeable with the costs of this suit: it was from this part of the decision that the plaintiffs appealed.

The Court are unanimously of opinion that the reason assigned by the Principal Sudder Ameen for exempting the respondents from costs is insufficient, and the order itself practically unjust. Soojan Singh is the son of Dureao Singh, one of the former zemindars, and the transfer of that portion of the estate is apparently a mere trick between the father and son to compass some fraudulent end. Moozuffer Hoossein Khan is the purchaser, by private transfer, of the share of Nirmul Singh, the brother of Dureao Singh, and former co-sharer in the village. He stands therefore in the place of Nirmul Singh, and has identified himself with that person, and Dureao Singh, by defending the suit to the utmost, and vindicating the act of Dureao Singh and Nirmul Singh in causing the disputed land to be included in the survey of their village. Had the respondents admitted the justice

of plaintiffs' claim, there would have been some shew of reason in absolving them from the costs of a suit which originated in no fault of theirs. The Principal Sudder Ameen, moreover, is chargeable with inconsistency in decreeing *wasildt* from the date of the institution of the suit against the respondent, Moozuffer Hoossein Khan, while he has exempted him from the costs of suit. The respondents are the persons, who have, by wrongful possession, deprived the plaintiffs of their just dues, and are therefore liable to all costs of suit. The decree for costs against Dureao Singh and Nirmul Singh is of little or no value to the plaintiffs, as those persons are not now in possession of the *zemindaree*, and are probably destitute of the means of making good the amount.

The Court amend the decree of the Principal Sudder Ameen, and gave a decree for costs against the respondents in common with the other defendants. The costs of the present appeal will be charged only to the respondents.

The 5th April, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 209 OF 1850. { *Special appeal from the decision of
J. T. Rivaz, Esq., Judge of Benares,
dated 10th May 1850.*

MUSSUMAT DULZEERA AND SHOOBALLEGH SINGH, (*Plaintiffs*),
Appellants,
versus

MUNSARAM, (*Defendant*), *Respondent.*

THIS case will be found reported at pages 24 to 26 of the printed decisions for Zillah Benares for the past year.

A special appeal was admitted to determine "whether the Judge and Sudder Ameen have not acted irregularly in setting aside the plaintiffs' deed of mortgage, the validity of which had been recognized by a previous regular decree; and whether the plaintiff was not entitled to a decree for possession against Munsaram, the present occupant of the premises, of which she held the mortgage."

The case came to a hearing this day in presence of the vakeels of both parties, and after hearing the arguments used by the respondent's vakeel in support of the decree of the Zillah Judge, this Court admits the validity of this reasoning, although the Judge in his decision does not express an opinion that the decree obtained by the appellant, Mussumat Dulzeera, in February 1848, was collusive and fraudulent, yet, on referring to the decision of

the Sudder Ameen of the 30th September 1848, which is upheld by the Judge in the decision now appealed from, I find that the Sudder Ameen has recorded his opinion that the former decree *was* collusive, and the Judge, having affirmed the decision of the Sudder Ameen, must be held to have adopted the finding of the Court of first instance on this point, although he has inadvertently omitted to say so. This consideration necessarily alters the complexion of the case, for no judicial opinion, recorded in a decree alleged to be fraudulent and collusive, can be held to bar a second suit to try that question between the fraudulent decree-holders and the party injured by such decree. The certificate of special appeal is therefore overruled, and the appeal dismissed, with costs.

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The 7th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

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CASE NO. 35 OF 1851. { Special appeal from the decision of
S. S. Brown, Esq., Judge of Goruck-
pore, dated 10th November, 1849.

SAHEBRADEH MUHPAL SINGH AND OTHERS, (*Defendants*),
Appellants,

versus

NUNDEY TEWARREE AND HIS HEIRS, (*Plaintiffs*), *Respondents*.

For the report of this case see pages 233 to 235 of the printed decisions for Zillah Goruckpore for the year 1849.

A special appeal was granted to try "whether the decision of the Judge is in conformity with law and judicial usage, and whether a manifest error in respect to the litigant parties, which pervades his judgment, does not render it necessary to remand the suit for retrial."

The Judge who granted the above certificate was doubtful as to the possibility of upholding the decision of the Zillah Judge on various grounds. In the first place, the *original birteeahs*, who, in common with the plaintiff, (the proprietor by purchase of a five one-third anna share of the *birt*) had had their claim rejected by the Settlement Officer, and had been referred to a regular Civil suit for the establishment of their right, had not joined the plaintiff in this action, but the Judge's decision is so worded as to lead the reader to suppose that *all* the sharers in the *birt* were parties to the suit, and that the existence of the entire *birt* had been

recognized by the decree. *Secondly.* It appeared to admit of doubt whether the possession of certain *seer* lands by the *birteeahs* was sufficient to establish a title at any future period to the management and possession of the entire mouzah, which question had been decided in the affirmative by the Judge, with reference to an opinion of the Revenue authorities quoted in the margin of the decree. This doctrine appeared to the certifying Judge to be somewhat opposed to the general rule laid down in Construction No. 942.

On a full consideration of the Zillah Judge's decision, and the objections urged thereto by the appellants, the Court are unanimously of opinion, that there is not sufficient cause shown for interfering with the decree. They do not consider it absolutely indispensable that the original *birteeahs* should be associated with the plaintiff in a suit of this nature. The plaintiff, as purchaser of a portion of the *birt*, was at liberty to sue for the recovery of his own individual rights, and although the decision of this suit in his favor may be eventually advantageous to the original *birteeahs*, they do not regard it as establishing the rights of any other party than the actual suitor. If the original *birteeahs* desire to obtain possession, they must also bring a suit to prove their claim. As respects the objection founded on the Construction No. 942, the Court observe that the Construction in question cannot be considered applicable to the present case, as the appellants in their reply to the suit did not urge this plea; on the contrary, they denied that the plaintiffs had ever held possession of any *seer* land whatever. This then was the point at issue between the parties, and the Judge, having found that the plaintiffs *had* possession of *seer* lands, considered this fact to be indicative of their *birt* right, and decreed accordingly. This Court admit that owing to the inaccurate wording of the decree there was considerable difficulty in dealing with the appeal, but, deeming the decision to be agreeable to law, they do not see any necessity for interfering with it, with the view of correcting what appears to be mere verbal errors.

The 7th April, 1851.

Present : { A. W. BEBBIE,
H. LUSHINGTON, } *Judges.*
H. W. DEANE, }

CASE No. 33 OF 1851. { *Special appeal from the decision of*
G. F. Harvey, Esq., Offg. Judge of
Cawnpore, dated 21st August 1850.

SHEOCHURN LALL, (*Plaintiff*), *Appellant,*
versus

MUSSUMAT ROOKMUN BHAO, (*Defendant*), *Respondent.*

THE printed decisions for August 1850 contain the particulars of this case.

A special appeal was allowed to try, "whether the Judge is not wrong in supposing that the provisions of Section 10, Regulation II. of 1803, are applicable to the present case."

The majority of the Court think that the decision of the Zillah Judge cannot be disturbed. Kalleel-ooddeen brought suit in 1844, founded on a deed in his favor executed by Mussumat Rookmun in 1837. Doorga came forward as an objector, on the ground that Mussumat Rookmun had executed a prior deed in 1835, in *his* favor, whereupon Kalleel-ooddeen made Doorga a defendant conjointly with Mussumat Rookmun.

The Court decided in 1844, that Mussumat Rookmun did execute the deed held by Kalleel-ooddeen, and that she did not execute the deed held by Doorga. The very issue was then raised by Doorga himself, in his defence, which he desires the Court to try now. If Doorga were to obtain a decree in the present suit, that decree would vitiate the finding which the Court came to in 1844. For, in the case supposed, the Court would declare that a particular act was done by Mussumat Rookmun, and, at the same time, was not done by her. It cannot be said, as it appears to a majority of the Court, that the deed on which Doorga now claims was held in 1844 to be not good as against Kalleel-ooddeen only, and that the claim as between Doorga and Mussumat Rookmun has not been tried, for if the claim of Doorga against Mussumat Rookmun had not been held to be not good in 1844, the result of Kalleel-ooddeen's suit would of necessity have been different from what it was,—the suit would have been dismissed, not decreed in his favor. In fine, the recognition or rejection of the claim of Kalleel-ooddeen rested, from the nature of the plea set up by Doorga, on the fact of the Court's finding, that the deed produced by one party was valid, and the deed produced by the other party not valid. The majority of the Court are further of opinion that

the remarks contained in MacPherson's Treatise on Civil Procedure, under the head of "Causes previously heard and determined", support the above view.

The appeal is, for the foregoing reasons, dismissed.

Present: H. LUSHINGTON, Judge.

I do not concur in the above decision, which is so worded as to assume, except in one passage, the real point of difference between my colleagues and myself.

I do not admit that the "Court decided that Mussumat Rookmun did *not* execute the deed to Doorga," nor that a decree to Doorga in the present suit "would vitiate the finding in 1844," not, at least, in the sense in which the words are used here. If these positions were sound, there could be no doubt in the case.

These, however, are verbal disputes. The real point at issue is, whether or not it was determined in the former suit that Doorga had no claim against Mussumat Rookmun. This point was not determined, for it was not the point directly at issue. That it was involved in the decision and *incidentally* disposed of is nothing to the purpose. It was determined so far as was absolutely necessary to enable the Court to dispose of the claim of Kalleel-ooddeen, but that was not a legal and final determination of the claim as against Mussumat Rookmun. The point *directly* at issue in the former suit was, whether Kalleel-ooddeen or Doorga had the preferable lien on certain mortgaged property. The point *directly* at issue in the present case is, whether Mussumat Rookmun owes money to Doorga or not.

If it were true that an incidental finding on a point not directly at issue were equivalent to a finding on *the* point directly at issue, then indeed a decree to Doorga in the present suit might "vitate the finding in 1844;" but this equivalence can exist only when the denial of it would necessarily lead to contradictory decretal orders: such would not be the case in the suit before us. The decretal order in Kalleel-ooddeen's case is, that Mussumat Rookmun owes money to Kalleel-ooddeen, and he shall realize it from the mortgaged property. The decretal order in Doorga's case would be, that Mussumat Rookmun owes money to Doorga, and he shall realize it as he can. Here there is no contradiction, although the point directly at issue in the latter case may have been incidentally disposed of in the former case.

It appears to me then that the parties to the two suits were not the same: that the issue was not the same, and that the claim of Doorga has not been *directly* adjudicated upon in any former suit. Therefore, the point has *not* been previously "heard and deter-

mined" in the legal acceptation of those terms; and with deference to the recorded opinion of my colleagues to the contrary, I must declare that, to my judgment, the remarks in MacPherson's Treatise entirely support my view of the case.

The 9th April, 1851.

Present : { A. W. BEGBIE, } Judges.
 { H. LUSHINGTON, }
 { H. W. DEANE, } Offg. Judge.

CASE No. 283 OF 1850. { Special appeal from the decision of
 C. Allen, Esq., Judge of Furruckabad, dated 27th August 1850.

DHOWKUL SINGH, (*Plaintiff*), *Appellant*,
 versus

MURDAN SINGH, (*Defendant*), *Respondent*.

THE printed decisions of the Zillah Courts for August 1850 give the particulars of this case.

A special appeal was granted to try "whether it was competent to the Judge to set aside the settlement proceedings, which the plaintiff pleaded in support of his claim."

The record of settlement in which the rights of the plaintiff in this suit are set forth, if free from error, is, at any rate, not very clearly drawn up, and the obscurity of the subject is deepened rather than dispelled by the Judge's decision. It would seem, however, that at the settlement under Regulation VII. of 1822, effected in August 1827, the plaintiff, Dhowkul Singh, was admitted, together with Cheit Ram and others, to revenue engagements, as zemindar, and that the *zemindaree* right of *Khunna Singh* and *Omer* were on the same occasion disallowed. It is pleaded by the respondent that the plaintiff is the son of, the above *Khunna Singh*; in his petition of plaint, Dhowkul Singh describes himself as *the son of Khunna Singh*, and it is not shown that there is any other person bearing the name of Dhowkul Singh.

At the revised settlement in 1836 we find engagements taken from four persons, Cheit Ram, Kesree, Kirpa, and *Dhowkul*. In October 1838, the *furd tufreek*, alluded to by the Judge, was made out, and the specific share, for the division of which the present claim is brought, was assigned to Dhowkul Singh. Kesree and Kirpa objected to this arrangement, but their objection was disallowed, and the Settlement Officer, on the 7th December 1838, maintained the validity of the *furd tufreek*. Thus, at the more

recent settlement the *zemindaree* title of Dhokul Singh was recognized, and his specific interest in the mouzah was declared. At the settlement, which preceded, the *zemindaree* right of Dhokul Singh was also allowed, though there is some reason to think that the son was then admitted, notwithstanding that the father was excluded.

Such being, whether rightly or wrongly, the position of the plaintiff, the Court are of opinion, with reference to the certificate of special appeal, that it was not competent to the Judge to refuse the partition sued for. The plaintiff has been found at the settlement to be zemindar, he was admitted to direct engagements, and the Settlement Officer further confirmed to him, by the judicial proceeding of 7th December 1838, on objection raised by other parties, the rights defined in the *furd putteedaree*. A suit for division of his share by a person so circumstanced offers no occasion for bringing his recorded rights into dispute, the proper course of any party aggrieved by the finding of the Settlement Officer being "a regular suit in the Courts to try the right."

Under this view of the case, the Court reverse the decision of the Zillah Judge, and pass a decree in the plaintiff's favor.

The 9th April, 1851.

Present : { A. W. BEBBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 183 OF 1850. { *Special appeal from the decision of
J. T. Rivaz, Esq., Judge of Benares,
dated 16th May 1850.*

MUSSUMAT LUCHMIN, (*Defendant*), *Appellant*,
versus

JAGESUR SINGH, (*Plaintiff*), *Respondent*.

THE particulars of this case are given in the printed decisions of the Zillah Courts for May 1850.

A special appeal was allowed to try "whether the Judge should not have exempted the appellant from liability to pay costs, inasmuch as the record of the case showed, that the plaintiff had specially, and in writing, consented to take on himself the costs of suit which would fall on this appellant."

In charging the appellant with costs, the Judge, apparently, overlooked a *soolehnamah*, filed with the record, according to which the costs of the appellant were to be defrayed by the plaintiff.

The Court modify the decision of the Judge, and order that the plaintiff make good the costs of Mussumat Luchmin according to his agreement.

The 9th April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

CASE No. 190 of 1850. { *Special appeal from the decision of
J. S. Clarke, Esq., Judge of Azimgurh,
dated 18th May 1850.*

PHENKOO SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

MUNDUL SINGH AND OTHERS, (*Plaintiffs*), *Respondents*.

SOME notice of this case is to be found in the Judge's English decision in the usual place. From this document and other papers in the *misal*, it appears that the disputed lands formed part of a mouzah Phoolaiieh, now no longer existing, as a separate mehal, and that so far back as 1832, these plaintiffs, or those whom they represent, sued in the Civil Court for possession, calling the quantity of land 51 beegahs.

This is perhaps the best place in which to notice the discrepancy in the nominal quantity of land then and now claimed. The present claim is for certain fields, the numbers of which are specified, according to the settlement papers, and the quantity of land is stated at 104 beegahs. Nevertheless, the Courts below, as well as the parties themselves, have treated the case throughout as if the 51 beegahs of the suit filed in 1832, and the 104 beegahs of the present suit were identical, and known to be so. When the vakeels of the special appellants and respondents were required to explain the discrepancy, they offered and objected to plausible accounts of the matter, but they agreed as to the one main point, namely, that, whether the 51 beegahs referred only to cultivated lands whilst the 104 included culturable and waste, or whether the 104 beegahs had been adopted in conformity with a certain statement of the defendants themselves, yet, the *numbers of the fields* were correct, and accurately designated the thing claimed in 1832, as well as in 1847, when the present suit was first instituted. Under these circumstances, the Court saw no necessity for investigating more particularly the origin of the discrepancy.

Whilst the suit filed in 1832 was yet pending in the Civil Court, the detailed settlement came on, mouzah Phoolaieh was broken up, and the disputed fields, with others, were attached to talooqua Goraita, the property of the defendants. The Revenue Authorities thus awarded to the defendants that which the plaintiffs had already sued for in the Civil Courts.

This occurred in 1835. On the 2nd August 1836, the plaintiffs gained a decree, which is still in force, nevertheless, some amongst the present defendants instituted another suit in the Civil Court for these lands, specifying the numbers of the fields, and naming the quantity of land as 104 beegahs. This suit was dismissed on the 16th December 1839. The plaintiffs assert that they then gained full possession and gave a lease of the lands to one Jogha, whom the defendants have now dispossessed, hence the present suit.

The decision of the Judge upholds the decree of the Civil Court against the award of the Settlement Officer passed whilst the suit was pending. This course is prescribed by Construction 1128, and cannot therefore be now impugned, although the Judge does not take any notice of the Construction, nor even of the Settlement *Misl* itself beyond the cursory remark that the "*khusrreh* and *kistwaree* papers also support the allegation of the plaintiffs."

From this decision, a special appeal was admitted, to try "whether this suit ought not to have been brought for the amendment of the Settlement Record as well as for the alteration of the six monthly papers; and whether this omission is not fatal to the suit in its present form."

The Court are of opinion that the informality noticed in the certificate is not such as to require that the plaintiffs should be nonsuited. It is not indeed quite clear why he expressed his claim as he has done. He may have doubted the legality of bringing a suit on the 23rd August 1847, to contest a settlement award dated 23rd August 1835, or he may have thought it right to take no notice of the settlement with reference to Construction 1128, or it may have been accidental. However this may be, the object of the suit is perfectly clear: and a claim to alter papers, whose contents are altogether dependant on the settlement, which would not be as they are but for the settlement, is in reality a claim to "amend the Settlement Record." Equity too appears to be on the side of the plaintiffs, for they are only endeavouring to obtain that which was decreed to them fifteen years ago.

The Court therefore dismiss the appeal.

The 14th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } Judges.

CASE No. 207 OF 1850. { *Special appeal from the decision of
R. J. Tayler, Esq., Judge of Jounpore,
dated 15th May 1850.*

MYDAN SINGH, (*Defendant*), *Appellant*,
versus

RANEE SHEO KUOR AND RANEE PEM KUOR, (*Plaintiffs*),
Respondents.

FOR the report of this case see pages 49 and 50 of the printed decisions for Zillah Jounpore for the past year.

A special appeal was admitted to determine, "whether the reasons assigned by the Judge for modifying the Moonsiff's decree in favor of the plaintiffs are sufficient or otherwise."

The Court are unanimously of opinion that the reasons assigned by the Judge for modifying the Moonsiff's decision are not sufficient in law to justify his doing so. If the mere fact of the field and jumma being written in the names of the two defendants were sufficient to make them responsible for the amount demanded by the plaintiffs, the cultivating classes would be entirely at the mercy of the zemindars. In a decision of this Court, under date 30th November last, in the case of Sheikh Byraj, appellant, *versus* Sheikh Zorawur and others, defendants, it was stated that "the Court are not prepared to hold that the rent roll deposited in the Collector's office, and signed by the Settlement Officer, *necessarily* constitutes the document, to alter which it is requisite to proceed under Sections 9 and 10, Regulation V. of 1812; because it is possible that that document may neither have been framed after due investigation, nor assented to by the rent-payers. In other words, it might be a document such as the Court believe to have been often drawn up by the subordinate Revenue Authorities, or by the malgoosar, without the concurrence of the individuals whom it affects, and without any enquiry on the part of the Settlement Officer." This dictum is strictly in conformity with the proviso contained in Clause 1, Section 9, Regulation VII. of 1822, "that all decisions on the demands of the zemindars shall hereafter be regulated by the rates of rent and modes of payment *avowed and ascertained* at the

settlement, and recorded in the Collector's proceedings, until distinctly altered by mutual agreement, or after full investigation in a regular suit." It does not appear from the Judge's decision that he had satisfied himself that the *jummabundee* was a *bond fide* document, in other words, a record of rents *avowed* by the parties and *ascertained* by the Settlement Officer, which two conditions are essential before it can be recognized by the Courts of Justice. The Court accordingly annul the decision of the Judge, and remand the suit for retrial, in order that he may pass a fresh decision in conformity with the present exposition of the law.

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The 14th April, 1851.

Present : { A. W. BEGGIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

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CASE No. 230 OF 1850. { Special appeal from the decision of
Mohamed Ruzzee-oodeen Khan, Prin-
cipal Sudder Ameen of Allygurh,
dated 29th July 1850.

TEJ SINGH, (*Defendant*), *Appellant*,
versus

SOONDUR LALL AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS suit is brought for possession of a four-biswah share in mouzah Attrowlie, by setting aside a collusive decree obtained by the defendants, on a deed of mortgage. Soondur Lall, the plaintiff, having a claim against Kesree and others, got from them an acknowledgment that they would not transfer their property till the claim was adjusted. He afterwards sued for his money. During the progress of his suit, his debtors transferred the property by mortgage to the present defendants. The suit of Soondur Lall proceeded, and he obtained a decree. The mortgagees sued for possession, and an *ex parte* decree was passed in their favor. In the execution of the decree given him, Soondur Lall brought to sale the property now in dispute, and was himself the purchaser: he comes forward in the present action to show that the decree in favor of the defendants was had by their collusion with his debtors, and he demands that that decree be set aside.

In the opinion of the Sudder Ameen the case could not be gone into, as possession had been formally and finally decreed to the mortgagees. Whatever the plaintiffs bought, he bought, the Sudder Ameen has observed, at his own risk, and as it has turned out, bought a loss.

The Principal Sudder Ameen, taking a different view of the matter, decreed in favor of the plaintiff.

A special appeal was allowed to try, whether it was competent to the Principal Sudder Ameen to pass a decree in the plaintiffs' favor, when the Court of first instance had rejected the plaintiffs' claim without entering upon the proof of it; that is to say, whether the Principal Sudder Ameen ought not to have remanded the suit to the Court of the Sudder Ameen, in order that the claim be duly investigated.

The Court remark that the point raised in the above certificate must be disposed of in favor of the appellant. No finding on the merits of the claim has as yet been had so far as regards the Court of first instance. The suit is therefore remanded to the Sudder Ameen's file, and he is directed to try it on its merits.

The 14th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 231 OF 1850. { *Special appeal from the decision of
Mohumed Luteef Khan, Principal
Sudder Ameen of Goruckpore, dated
29th July 1850.*

SEWUK DASS, (*Plaintiff*), *Appellant*,
versus

PEMNATH AND OTHERS, (*Defendants*), *Respondents.*

THE plaintiff sued in the lower Court for possession of certain property, by the ejection of the defendants. The Moonsiff entered into the merits, and held that the claim was not established. He likewise recorded his opinion, that the time allowed by law for hearing the suit had expired.

The Appellate Court of the Principal Sudder Ameen dismissed the suit, on the sole ground that it was barred by the limitation law.

The record of the case shows that the property in dispute was made over to the plaintiff on the 19th September 1832, on a *birt pottah*, and that, on the 27th September 1832, a written agreement was drawn up, under which the plaintiff bound himself, on certain conditions, to refrain from the enforcement of any demand against the property for five years, the time being calculable from the beginning of the Fuslee year 1240 to the end of 1244 Fuslee.

The defendants, meanwhile, retained possession. On the 28th September 1839, the plaintiff sued to be put in possession, on the plea that the contract had not been fulfilled, and was nonsuited on the 22nd November 1842. The suit is now revived, and has resulted in the judgment abovementioned.

A special appeal was granted to try, whether the Court below has not erred in pronouncing the suit barred by lapse of time.

The Court find the Principal Sudder Ameen's decision to be wrong. The plaintiff's cause of action arose at the end of 1244 Fuallee, which corresponds with the 14th September 1837. The present suit was brought on the 11th September 1849, and may therefore be heard, having been instituted within the legal period of twelve years.

The judgment of the Principal Sudder Ameen is annulled, and the suit is remanded to his file, in order, that he try it on its merits.

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The 14th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges.*
H. W. DEANE, }

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CASE NO. 54 OF 1851. { *Special appeal from the decision of
Doobé Jowala Pershad, Principal
Sudder Ameen of Azimgurh, dated
September 1850.*

OOGUR RAI AND OTHERS, (*Defendants*), *Appellants*,
versus

LIPPUN RAI AND QADIR BUKSH, (*Plaintiffs*), *Respondents*.

THE plaintiffs claim possession of 14 gundahs 1 butt, mouzahs Hurkur, &c., by descent.

In 1849, one Mussumat Beerjee, the widow of a Lippun Rai, not the present plaintiff, sued both the parties to this suit, and obtained a decree for 14 gundahs 1 butt share in the *puttee* against which the present claim is brought. The decree of the Moonsiff is dated 19th August 1849, and rests principally on the fact, ascertained after investigation, that the Lippun Rai, deceased, whose widow had brought the action, was the Lippun Rai whose name appeared in the Settlement papers. Lippun Rai, now plaintiff, was a defendant in that suit, though he did not answer; and as that decree is in force, Lippun Rai, plaintiff, cannot support his claim by any reference to the Settlement.

The present suit is brought against the plaintiffs, co-defendants in the former suit, and also against Mussumat Beerjee herself, who confesses judgment, for exactly the same amount of share in the same *puttee* as was contested in the former suit; not, apparently, for the same thing: the Moonsiff dismissed the claim on the ground of long dispossession, but the Principal Sudder Ameen, considering possession proved, passed a decree in favor of the plaintiff, and quoted, in support of his opinion, the entry in the Settlement papers (see Tehseeldar's Report 25th December 1835), which, in 1849, had been declared to refer to the deceased husband of Mussumat Beerjee.

The plaintiff, Qadir Buksh, purchased from the other plaintiff half of the property claimed, twelve days before the institution of the suit.

The certificate of admission refers two points for the consideration of the Court. 1st. Whether the form in which the suit has been brought involves champerty. 2ndly. Whether the conflicting opinions of the Moonsiff in 1849, and the Principal Sudder Ameen, in the present case, in regard to the individual referred to by the tehseeldar's report as Lippun Rai, do not bring these suits within the meaning of Section 7, Regulation XIX. of 1817.

The Court do not consider that the simple facts of purchasing a share of a chose in action, and then suing jointly with the seller, constitute champerty, as understood in this country. In all the reported cases there is to be found some sort of contract by which the transfer was made, on condition that funds were advanced by the transferee for the prosecution of the suit, whereas no such condition appears in the case before the Court. Champerty, maintenance and common barratry are even criminal offences by the law of England, but it is always supposed that there has been some "officious intermeddling", which tends to keep alive strife, and disturb the repose of society, some "inciting and stirring up of disputes," or the like, and the Court find nothing of this sort in the conduct of the present suitors.

In regard to the second point, they are of opinion, that the two orders are inconsistent. The Lippun Rai of the settlement cannot be at once the deceased husband of Mussumat Beerjee and the present plaintiff, and if the claims of the plaintiffs in the two suits and the decrees of the two Courts had all been based upon this entry, it would have been necessary to proceed under the law quoted in the certificate. The Court, however, have some doubt whether this is exactly the case. The plaintiff in his petition of plaint does *not* assert that he is the Lippun Rai of the settlement, and the admission of the Principal Sudder Ameen that he is so, has the appearance of having been subjoined to the other grounds of

his decision. On the other hand, it is an addition so very important, that from the moment it is even mentioned, it becomes necessarily the principal ground of decision. The share claimed too is of exactly the same amount, and in the same *puttee*, as the share of Mussumat Beerjee's deceased husband. The amount itself, "14 gundahs 1 butt", suggests the idea of identity; and the idea acquires force, when we observe that the plaintiff has not shown by what descent he is entitled to this 14-gundah 1 butt share. His vakeel cannot even state how his client arrives at this particular amount, if it be *not* the 14 *gundahs 1 butt* of the settlement. The *koorseenamah* filed by the plaintiff throws no light upon the subject, and is, moreover, manifestly incorrect. The *putteedarree fard*, prepared, as is stated, according to the tehseldar's *kyfecut*, is not with the *misl*, nor is there any copy of the settlement *roobakaree*.

Under these circumstances, the Court think it advisable to remand the case to the file of the Principal Sudder Ameen, that he may hear it *de novo*, and, in the event of his again determining in the plaintiffs' favor, may distinctly specify in his decree what it is that he awards, and from whom it is to be taken, bearing in mind that the identity of Mussumat Beerjee's deceased husband with the Lippun Rai of the settlement is a fact already determined by the decree of the Moonsiff in 1849, and no longer open to discussion.

The decision of the Principal Sudder Ameen is annulled, and the case remanded to his file accordingly.

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The 14th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

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CASE NO. 216 OF 1850. { *Special appeal from the decision of*
R. J. Tayler, Esq., Judge of Jounpore,
dated 16th May 1850.

DEEN SINGH AND MUNNEE SINGH, (*Defendants*), *Appellants*,
versus

RANEE SHEO KUOR AND OTHERS, (*Plaintiffs*), *Respondents*.

THE Judge's decision is to be found in the usual place amongst the printed reports. It is to be observed, however, in reference to the Judge's remark, that the "Settlement had been upset," that the settlement had *not* been upset. The proprietary right had

been transferred by a decree of Court, and the decreeholders were admitted to engage for the revenue. The village is mouzah Dugowlee in talooqua Budlepore, the history of which is well known.

The suit is brought nominally for arrears of rent ; but the object of the suit is to substitute a certain rate of rent, alleged to have been formerly paid, for the rate recorded in the settlement *jummabundee*. At first sight then this would appear to be a suit for enhancement under cover of a suit for rent, as in the case of Tulloo Misser, *versus* Sheo Kuor of Budlepore, decided by the Sudder Dewanny Adawlut on this date, and should be dismissed ; but, on referring to the settlement papers, it appears that the rate entered in the *jummabundee* was confessedly a favorable rate, "*bah mojjib purta*," not a pergunnah rate, or rate such as was paid for similar adjacent lands. The defendants were the zemindars with whom the settlement had been made, and who were ousted by the decree of the Civil Court already referred to, and the *jummabundee* had been prepared by themselves. In seeking under such circumstances to substitute the rent formerly paid to Sheo Lall Doobé, for the rate by "*purta*" recorded in the *jummabundee*, the plaintiffs have not, in the opinion of the Court, necessarily incurred the penalty adjudged against them in the case of Tulloo Misser, appellant, though they have rendered themselves liable to it. The circumstances of this case are peculiar, and, upon the whole, the Court are content to regard it in the light of a suit, brought for enhancement of rent.

The lower Courts have decided that the rent demandable from the defendants is that which was formerly paid to the plaintiff's ancestor Sheo Lall Doobé : but the point apparently considered to be at issue was, which of the two rates was the correct rate, that paid formerly, or that favorable rate recorded in the *jummabundee*?

A special appeal was therefore admitted to try, "whether the Courts, in decreeing the rent paid in the time of Sheo Lall Doobé, have conformed to the law in the Sections 5, 6 and 7, Regulation V. of 1812."

The Court are of opinion that they have not so conformed to the law. According to the provisions of the Sections quoted, the rate demandable by the proprietor is the pergunnah rate, or the rate payable for land of a similar description in the places adjacent, and this the Moonsiff, supported by the Judge, has taken no trouble to ascertain. The capabilities of the land have not been adverted to, although so long as this revenue operation is left by the law in the hands of Judicial Officers, the utmost deliberation and care are required. The Moonsiff has simply

adopted an alleged former rate, without declaring it to be in his opinion a fair rate, whilst the defendants assert, that the land is not able to pay even the lower rate entered in the *jummabundee*.

The decisions of the lower Courts are annulled, and the case is remanded to the file of the Moonsiff, in order, that he may determine the rent, with reference to the capabilities of the soil, and in accordance with the spirit of Sections 5, 6 and 7, Regulation V. of 1812.

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The 14th April, 1851.

Present : { A. W. BEGRIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

CASE No. 2 OF 1851. { Special appeal from the decision of A. C.
Heyland, Esq., Judge of Ghazeepore,
dated 11th June 1850.

KHODA BUKSH KHAN AND OTHERS, (*Plaintiffs*), *Appellants*,

versus

AKBAR ALI AND OTHERS, (*Defendants*), *Respondents*.

THIS suit is brought to cancel two auction sales, and the particulars of the case are to be found in the English decision of the Zillah Judge at the usual place.

The suit was dismissed in the Courts below, on the grounds assigned in the decision referred to ; and a special appeal, on the part of the plaintiff, was admitted to try the following points :—

1st. Whether the plea of irregularity in the mode of conducting a sale cannot be entertained, unless a petition of objection has been presented under Clause 3, Section 3, Regulation VII. of 1825.

2ndly. If such plea can be tried, whether the omission to affix a copy of the usual proclamation in the Moonsiff's Court is not fatal to the validity of the sale.

3rdly. Whether the sale of this same property, on the 8th October 1844, in the execution of another decree, does not invalidate the two subsequent sales of the 15th November and 31st December 1844, the sale of the 8th October not having been cancelled until the 1st February 1845.

4thly. Whether the sale of the property as Meer Dad Khan's, is legal, he having died before the estate was sold in execution, and notice not having been served upon his heirs as required by Clause 8, Section 15, Regulation XXVI. of 1814.

On the 1st point, the Court observe that the petition required by Clause 3, Section 3, Regulation VII. of 1825 is a necessary preliminary only to the reversal of a sale on a *summary* enquiry, which summary enquiry is also further described in Clause 1, Section 5 of the same Regulation, and that there is nothing to prevent the institution of a regular suit, the object of which is to reverse a sale on the ground of irregularity, whether such petition has been presented or not. The Judge therefore was not justified in declining to hear the plea.

On the 2nd point, the Court are of opinion that the prescribed proclamation in the Moonsiff's Court cannot be dispensed with, and that a sale effected without the observance of this necessary condition is invalid.

In reference to the 3rd point, there can be no doubt that the sale of mouzah Boolah, on the 15th November, and the sale of mouzah Zynabad, on the 31st December 1844, were invalid, since the previous sale of these two villages, held on the 8th October 1844, had not, up to the time of the second sales, been cancelled. The same property cannot, under ordinary circumstances, be sold twice over in execution of decrees.

In regard to the 4th point, it appears that execution of decrees had been taken out against the nine defendants in the suit, only one of whom, Meer Dad Khan, is stated to have died previous to the sale. This is not the state of things contemplated by Section 15, Regulation XXVI. of 1814, which provides for cases in which "enforcement of the decree shall be *solicited* against heirs or representatives." Neither is it clear that the decreeholder had any knowledge of the death of Meer Dad Khan at the time of the sale. Upon the whole, the Court are disposed to reject this plea as a ground for annulling the sale.

The decisions, however, on the second and third points, in the certificate, are fatal to the validity of the sales of the 15th November and 31st December 1844, which must be cancelled accordingly.

The decrees of lower Courts are reversed, and a decree is given to the plaintiff.



The 14th April, 1851.

Present : { A. W. BEGGIE,
H. LUSHINGTON,
H. W. DEANE, } Judges.

CASE No. 9 OF 1851. { *Special appeal from the decision of
R. J. Tayler, Esq., Judge of Jounpore,
dated 23rd April 1850.*

TULLOO MISSEK, (*Defendant*), *Appellant*,
versus

SHEO KUOR AND PEM KUOR, (*Plaintiffs*), *Respondents*.

THIS suit is brought for rent of certain lands in mouzah Sudahee, talooqua Budlapore, the plaintiff claiming Rs. 40-11-3, as the annual rent, and the defendant maintaining that the amount had been fixed by the Settlement Officer at Rs. 23. The particulars of the demand, and the decretal orders already passed are to be found in the Judge's English decree.

The lower Courts have decreed the sum claimed, the Judge being of opinion, that Rs. 40-11-3 "was established as the jumma," but on the application of the defendant, a special appeal was admitted to test the correctness of this decision.

The present suit has not been brought to enhance rent, or to reverse the settlement, but simply for rent according to the putwarree's *vasil bakce*, and the sum entered therein, though supported by the village papers and by witnesses, is opposed to a distinct order of the Settlement Officer, dated 26th December 1839. On that occasion the *jummabundee* was published for general information; several *assamees* objected, and amongst them was Gungai, or Gunga Dutt Misser, the father of the defendant, Tulloo Misser. The Settlement Officer, after due enquiry, declared the rent payable by Gunga Dutt Misser to be Rs. 23; and if the *jummabundee* was not altered accordingly, it *ought* to have been altered. Rs. 23 was the rent

* Section 9, Regulations VII.
of 1822, and IX. of 1833.

determined at the settlement *after investigation*,* and until a regular suit is brought for enhancement, the amount cannot be questioned.

The Judge does not seem to have been aware of the importance of the decision of the Revenue Authorities, dated 26th December 1839. He notices, without quoting the date, that "the *jummabundee* was modified," and then proceeds, without a single reason assigned, to record a decree in direct opposition to the modification alluded to.

The Court reverse the decrees of the Courts below, and dismiss the claim of the plaintiffs.

The 15th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 239 OF 1850. { *Special appeal from the decision of
J. T. Rivaz, Esq., Judge of Benares,
dated 23rd July 1850.*

GYANEE, (*Defendant*), *Appellant*,
versus

TAJ MOHUMED, (*Plaintiff*), *Respondent*.

THE printed decisions for July 1850 contain the particulars of this case.

A special appeal was granted to try, whether it was competent to the lower Courts, under the peculiar circumstances of this case, and with reference to judicial usage, to pass a decree against the defendant Gyaneer.

The Court are of opinion that the appellant was wrongly impleaded in this action. The liability of the police to suits for damages on account of injury wilfully done to individuals in executing, or, more properly speaking, in exceeding the order of their superiors, may not be disputable, but this liability does not divest the police of their police character, and, in ordinary cases, is not capable of extension so as to reach unofficial persons. The police having been present on the spot in this instance, for the purpose of carrying out an order of the Magistrate, all authority was vested in them, and whoever else was present and taking any part in the matter, must, necessarily, be presumed to have acted under the orders of the police.

The decision of the Zillah Judge is modified, and the suit, as against the appellant, Gyaneer, dismissed.

The 21st April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 225 OF 1850. { *Special appeal from the decision of
Tussuddooq Hoossain Khan, Principal
Sudder Ameen of Aringwah, dated
14th June 1850.*

GOWREE PERSHAD, (*Plaintiff*), *Appellant*,
versus

RAMDIAL PANDE AND OTHERS, (*Defendants*), *Respondents*.

THE plaintiff sued to establish his right to certain land (11 beegahs 17 biswahs) as belonging to the village of Greewa, of

which the plaintiff is a sharer, and he pleaded that the defendants contrived at the settlement to get the land in dispute measured within the *ruqbah* of their village, Mehdea.

The defendants replied that the land had already been judicially declared to belong to them.

The Sudder Ameen decided in favor of the plaintiff.

In appeal, the Principal Sudder Ameen remarked, that the plaintiff when formerly sued by the present defendants denied that the land belonged to the plaintiffs' village Greewa. The proprietary title had already, the Principal Sudder Ameen added, been adjudged to the defendants.

A special appeal was allowed to try "whether the Principal Sudder Ameen, in dismissing the claim of the plaintiff, has not omitted to advert to the fact that the land, of which possession is sought, was declared by the Court of first instance to be land other than that which had previously formed the subject of dispute between the parties, and, consequently, whether the Principal Sudder Ameen, in assuming the lands to be identical, has not decided in error."

The Court are of opinion that the Principal Sudder Ameen has fallen into the mistake on which the certificate of special appeal is founded. The Sudder Ameen, before whom the case first came, has ruled very distinctly that the pleas of the defendants are unsustainable, because the land formerly adjudged to them is not this, but other land. The Principal Sudder Ameen, without taking this finding into his consideration, has been content, to assume the identity of the land now and, formerly disputed. The unavoidable conclusion to which any one reading the Principal Sudder Ameen's judgment would come, is, that the Principal Sudder Ameen was not aware of the distinction drawn by the Court of first instance.

A decision so imperfect must necessarily be set aside; and the suit is remanded to the file of the Principal Sudder Ameen, in order to its retrial.



The 21st April, 1851.

Present: { A. W. BEGGIE,
H. LUSHINGTON,
H. W. DEANE, } Judges.

CASE No. 213 OF 1850. { Special appeal from the decision of
J. Muir, Esq., Officiating Judge of
Cawnpore, dated 30th April 1850.

GYA PERSHAD, (*Plaintiff*), *Appellant*,
versus

GOWAL DASS, (*Defendant*), *Respondent*.

THE report of this case will be found at pages 39 and 40 of the printed decisions for Zillah Cawnpore for the past year.

A special appeal was admitted "to try whether the ground on which the Judge's decision has been made to rest is singly sufficient to support it, no advertence having been had in the judgment to the oral evidence on either side, or to the reasons of the decision of the lower Court, which has been reversed."

The Court, as at present constituted, are unable to concur in the doubts expressed in the certificate as to the sufficiency of the reasons assigned by the Zillah Judge for his decree. They do not think that it can be assumed that the Judge did not advert "to the oral evidence on either side, or to the reasons of the decision of the lower Court." On the contrary, it appears to this Court that the Judge *did* weigh the evidence before he formed his opinion, that he altogether distrusted the evidence adduced by the plaintiff, and saw reason to believe that the signatures of some of the attesting witnesses had been affixed to the bond *subsequently*, and not at the date which the bond bears, a supposition which, if correct, is quite sufficient to overthrow the plaintiff's case, to give to the bond the complexion of fraud and forgery, and to brand the witnesses thereto as perjurers. Taking this view of the case, the Zillah Judge could not decide otherwise than he has done, and it is not within the province of this Court, in special appeal, to express any opinion as to the merits of the case, or the correctness of the Judge's conclusions in regard to facts found by him.

The appeal is dismissed with costs.

The 21st April, 1851.

Present: { A. W. BEGRIE,
H. LUSHINGTON, } Judges.
H. W. DEANE, }

CASE NO. 82 OF 1850. { Regular appeal from the decision of
Mohumed Jumeel-ooddeen Khan,
Principal Sudder Ameen of Benares,
dated 23rd December 1848.

SYED MOHSIN ALI, MIRZA ALI HYDER, SOFEEYA BEGUM, HEIRS OF
KHANUM JAN, DECEASED, (*Defendants*), *Appellants*,

versus

MIRZA MOHUMED HOOSSEIN, (*Plaintiff*), *Respondent*.

THIS action has been brought to recover plaintiff's share, by descent, in the property left by Mohumed Mirza, deceased, and to set aside the will of the said Mohumed Mirza under which the defendants hold, as also other transfers effected by the devisees.

ANCESTOR.

Mohumidee Begum—Hajee Khanum—Ibrahim Beg,		
Mohumed Hassun,	Mohumed Mirza =	Mussumat Misree
Najuffee Khanum,	deceased,	Khanum, deceased,
Mirza Mohumed Hoossein,	plaintiff.	

Khanum Jân, defendant, now represented by the appellants, was the sister of Misree Khanum, the wife of Mohumed Mirza, who succeeded to the possession of the estate on the death of Misree Khanum. All the members of the family of Mohumed Mirza, and those who hold under them, so far as they are known to the plaintiff, have been made defendants.

The point at issue therefore is, whether the estate of Mohumed Mirza is to descend according to the alleged will of the testator, or according to the Mohomedan law of inheritance.

The pleas of the parties are numerous, but the turn which the case has taken in appeal obviates the necessity of noticing them minutely. The adjudication upon the principal plea has disposed of all the rest.

The Principal Sudder Ameen was of opinion that the will had been executed without the consent of the plaintiff, and, in conformity with the *futwa*, which he had applied for and received from the law Officer of the Court, he recorded a decree in favor of the plaintiff, on the ground that plaintiff's consent had not been obtained. Had the Court agreed with the Principal Sudder Ameen on the point of consent, it would still have been necessary to modify the decision, or to remand the case, since the Prin-

cipal Sudder Ameen has left several important pleas undisposed of. The Court, however, are satisfied that the plaintiff did acquiesce in the disposal of the property by will, and that he cannot therefore claim the benefit of that provision of the Mohomedan law, which declares a devise to be invalid unless the consent of the heirs has been obtained.

According to the *futwa*, the *Sheeas* may devise one-third of their property even without the consent of the heirs, whereas the *Soonnees* do not enjoy this privilege. The plaintiff declares that he is a *Soonnee*; but, as consent has been found, it is needless to advert more particularly to this part of the subject.

Mohumed Mirza, the owner of the disputed property, died without children, in 1842, having, as alleged by defendants, executed a will on the 2nd May of that year, in favor of his wife, Misree Khanum, who, by the terms of the deed, was to manage the estate "*buh-ihitimam-i-Abdoollah Beg.*" The will took effect, Misree Khanum was registered without objection in the Collector's Office in succession to Mohumed Mirza, and she conducted law suits, and managed the estate, up to the time of her death, which occurred in 1846. She was succeeded, as has been stated already, by her sister Khanum Jân, and then commenced the dispute, which has resulted in the present suit. Misree Khanum had mortgaged, and Khanum Jân had alienated by gift, part or the whole of the bequeathed property; the mortgagees and the donees have been made defendants accordingly.

The execution of the will is very faintly denied. So much so, that the Principal Sudder Ameen would appear, from the tenor of his decree, to have taken the fact as admitted: and although, in appeal, the plaintiff's vakeel positively rejects it, the Court see no reason for entertaining an opinion on this point different from that which the Principal Sudder Ameen has apparently formed. The petition of plaint distinctly acknowledges that Misree Khanum held under the will, and it contains these words, "since females are unable to conduct law suits and manage land themselves, and since I lived elsewhere, the estate came to be managed, according to the will, *buh-ihitimam-i-Abdoollah Beg.*" An attempt was made to show that these expressions referred to some other *wuseeyutnamah*, but nothing whatever was advanced in support of the assertion.

The plea upon which the plaintiff insists is, that he never consented to the will. The Principal Sudder Ameen has admitted this plea without giving a single reason for it, although the admission involves forgery on the part of the defendants. He declares simply that the plaintiff did not sign the *wuseeyutnamah*. The law of evidence in India is very different from the law of evidence in England, where the first principle is, that all testimony

is true until it be shown to be false, but still the decision in India is not altogether arbitrary. Some ground must exist for setting aside evidence, and that ground should be clearly stated in the decree.

In the case before the Court, the will itself has been produced, signed and numerously witnessed, and the only objection suggested by inspection is, that it is not registered. This is of no moment, since whatever doubt there may be, attaches to the signature of the plaintiff thereon as a witness to the deed, and not to the execution of the deed itself. If the plaintiff's signature be genuine, his consent to the will is of course proved. Five of the other subscribing witnesses depose that the plaintiff, Mirza Mohamed Hoossein, was present and consenting, and that he attested the will with his signature. Not one of the many remaining witnesses to the deed has given evidence opposed to that given by these five persons; but each party has, as usual, examined other witnesses, who depose, generally, to the facts alleged by those who produced them. The first part of the signature corresponds remarkably with the first part of the signature on the *vakalatnamah* filed with the *misal* by the plaintiff, a point to which no great importance can be attached, but which may be borne in mind whilst weighing other proof. The plaintiff, moreover, remained silent from the death of Mohamed Mirza, in 1842, till the death of Misree Khanum, in 1846, without offering the least objection, although, as clearly established by his own plaint, he knew that Misree Khanum had succeeded to the property, and that she managed the law suits and the land "*az rooe wuseeyutnamah duk ihtimam-i-Abdoollah Beg.*" Independently of the declaration in the plaint, it is incredible that Misree Khanum should have performed a series of formal acts in the Civil and Revenue Courts without the plaintiff's becoming aware of them. Nor indeed is cognizance denied: plaintiff endeavors to explain his silence by the unanimity which prevailed in the family, and he would have it believed, that though he practically acquiesced in the operation of the will for four years, yet his acquiescence was temporary and conditional. It is also worthy of notice, that the whole family, together with the mortgagees, seem to be of one accord, and opposed to the plaintiff. He is not supported even by his own branch of the family, the other children of Mohamedee Begum, or their heirs, having sided with the devisees.

For these reasons, the Court find "consent" on the part of the plaintiff, and as the decision on this point governs the whole case, it is unnecessary to notice, more than has been done already, the other parts of it.

The Court reverse the decision of the Principal Sudder Ameen, and dismiss the claim of the plaintiff.

The 21st April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 65 OF 1850. { *Regular appeal from the decision of
Mohumed Jumeel-ooddeen Khan,
Principal Sudder Ameen of Benares,
dated 23rd December 1848.*

CHOONNEE LALL, (*Defendant*), *Appellant*,

versus

MIRZA MOHUMED HOOSSEIN, (*Plaintiff*), *Respondent*.

THE appellant is the mortgagee alluded to in the above decision, No. 82, Syed Mohsun, &c. *versus* Mirza Mohumed Hoossein. He appeals to set aside certain expressions in the decree of the Principal Sudder Ameen, and to obtain an order for his costs, which have not been allowed him.

That decree having been reversed, it remains only to declare the plaintiff liable for the costs of appellant.

The 21st April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 67 OF 1851. { *Special appeal from the decision of
J. P. Gubbins, Esq., Judge of Dehlie,
dated 6th September 1850.*

MULICK DHOOME, (*Plaintiff*), *Appellant*,

versus

BUSTEE AND JYKURRUN, (*Defendants*), *Respondents*.

THE particulars of this case are to be found at page 196 of the printed decisions for zillah Dehlie.

Of the two defendants, against whom a decree had been given by the Moonsiff, only one, Bustee, appealed to the Judge, yet the Judge reversed the decree in respect of them both, although their responsibility was not in common.

A special appeal was admitted, on the application of Mullick Dhoomee, to try, whether the Judge was right in dismissing the suit as regarded the non-appealing defendant Jykarrun. This case is precisely similar to the case noted in the margin.*

* No. 2 of 1850.
Emam-ooddeen Khan, plain-
tiff appellant,

versus
Telok Singh and others,
defendants, respondents.
Sudder Dewanny Adawlut,
5th July 1850.

According to Construction 997, the Civil Courts ought, as a general rule, to "con-
fine themselves to the decision of the
objections to the decree made by the parties who appeal, but that, when obviously
required for the ends of justice, the juris-
diction of the Appellate Court may extend
to all the interests affected by the decree;"

and whenever the Courts avail themselves of this discretion, a special declaration of the necessity for their doing so should be recorded.* In the case before the Court,

* Becha Lall, appellant,
versus
Cheda and others, respondents,
Sudder Dewanny Adawlut,
25th June 1849.

no such declaration has indeed been made, but, from the tone of the Judge's decision, the Court infer that this has been an accidental omission. They therefore annul the decision of the Judge, and remand

the case to his file, in order that, in the event of his being of opinion that the ends of justice obviously required the reversal of the whole of the Moonsiff's decree, he may declare the same in conformity with the precedent of this Court above referred to.

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The 24th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON, } *Judges.*
H. W. DEANE, }

CASE No. 50 OF 1851. { *Regular appeal from the decision of
Mohamed Kureem-oollah Khan, Prin-
cipal Sudder Ameen of Agra, dated
26th April 1848.*

BOARD OF REVENUE, (*Defendant*), *Appellant*,

versus

MR. H. H. BELL, (*Plaintiff*), *Respondent*.

THIS appeal was heard by a full Court on the 8th January 1849, and the judgment of the Court of first instance was then reversed. A review of judgment has been granted on the ground, that "it appears from the proceedings that the English letters and documents, referred to in the judgment, as affording proof that the Board did not grant leases independently of the sanction of Government, were not accompanied by a vernacular translation,

and the respondent had no opportunity afforded him of urging objections against them." The admission of the review of judgment necessarily brings the whole case under discussion, and it is now re-considered in all its bearings.

The main points raised by the application of the respondent may be conveniently ranged in the following order.

1st. Does Section 4, Regulation IX. of 1825 give power to the Government to interfere, confirming or annulling, to the extent supposed?

2nd. Was the farm given under Act I. of 1841, or under Regulation IX. of 1825?

3rd. If the latter, then, did the orders of Government of 5th June 1832, make the sanctioning order of the Sudder Board complete, although it was conditional on the confirmation of Government?

4th. What was the practice in regard to confirmation of farms up to 1844; as the defendants have represented it, or not, and if not, how does that circumstance affect the case?

5th. Was the annulment of the farm by one member illegal; and if so, is the Government order thereby rendered a nullity?

The words of Section 4, Regulation IX. of 1825 are, "it shall be competent to the Collector with the sanction of the Board, and subject to the orders of Government, to annul the existing engagements, and to let the mehal in farm." It is contended by the respondent that the words used in the above passage, "subject to the orders of Government," are to be read with reference to the annulment of existing engagements only, and that their application cannot be carried on to the remainder of the sentence, "and to let the mehal in farm." This is to pervert language remarkable for nothing save its simplicity and easiness of interpretation. The Court read the words, "subject to the orders of Government," in connexion with the whole sentence, and as embracing the whole process, which the Section authorizes, for the realization of revenue balances. They cannot admit that the law designed to confer on the Government a power of limited interference, a sort of half intervention, under which they might meddle with the transaction, and would then be compelled to retire.

The next question to be considered is, under which of the laws above quoted this farm was given. The object of the respondent is of course to show that it was given under Act I. of 1841, because a transfer under that enactment cannot be interfered with, as can a transfer under Regulation IX. of 1825. The tenure of the estate is confessedly *putteedaree*, and is composed of three *puttees*. The whole mehal, however, not a part of it, was farmed. Act I. of 1841 lays down the rules under which transfers of

puttees in *putteedaree* estates shall take place, but Section 10 of Act I. 1841 evidently alludes to another law, and not this, as regulating the transfers of entire estates. The words of Section 10, Act I. of 1841 are, "nothing contained in this Act shall bar the indefeasible right of Government to hold the entire body of proprietors, and the entire estate, responsible for the whole jumma, and to enforce the existing Regulations for the transfer or sale of the whole estate whenever it shall appear to them just and expedient." The "existing Regulation" is Regulation IX. of 1825. The Board sanctioned the farm, in express terms, under that law. No other law was applicable to the case, consequently, however erroneous may have been the Collector's conception, he really acted under Regulation IX. of 1825, while he believed that he acted under Act I. of 1841. The mistake of the Collector cannot render a transfer, which is legal under one law only, legal under another. At the same time, it cannot be denied that much hardship has been inflicted on the respondent by the unheeding conduct of the Revenue Authorities. The Collector, in the *pottah*, which he gave, specified the *puttees* by name, and intimated that he acted under Act I. of 1841. The Commissioner, in transmitting the Board's sanction, wrote of "three *puttees* of mouzah Himmutpore" and omitted to mention that the Board had sanctioned the arrangement, as stated in their letter, under Regulation IX. of 1825. Very reasonably, therefore, might the respondent assure himself of the completeness of his bargain. He cannot charge himself with any want of circumspection, but he may justly blame the authorities for not pointing out to him his true position.

We are now to enquire, whether the orders in Council, of the 5th June 1832, made the sanctioning order of the Board complete, although it was conditional on the confirmation of Government. Section 8, Regulation X. of 1831 enacts, that "the whole of the powers and authority now vested in the Sudder Board at the Presidency are hereby declared to belong to the members on deputation within the limits subject to their control, so long as this Regulation shall remain in force, who shall also be guided in their official proceedings by the existing rules applicable to that Board, subject to such restrictions and provisions as the Governor General in Council may prescribe." There existed at that time certain rules of practice dated 17th February 1829, and by Rule XI. a reference to Government was necessary on the occasion of transfers. On the 5th June 1832, certain other rules of practice, on the principle of the above law, were issued, and it was declared, among other things, "in modification of the orders of the 1st ultimo, His Honor in Council is pleased to resolve that the Sudder Board shall be considered competent to sanction any farms for a

period not exceeding ten years, except in the case of estates under temporary management, to the exclusion of the proprietors." This modified the XIth Rule of Practice laid down on 17th February 1829. It is argued by the respondent, that these rules not only have the force of law, but abrogate substantive statute law of prior enactment, whenever such prior law is opposed to them. In other words, the orders of the 5th June 1832, conveying to the Board power to grant, under certain conditions, farming leases for ten years, are said to supersede Section 4, Regulation IX. of 1825. This position is not tenable; no mere rules of practice, drawn up on the principle declared in one law, suffice to expunge any other law from the statute book, although the Court may allow that that which is actual law in itself, when at variance with prior law, supersedes and rescinds prior law. But even if for the purpose of argument, the rules of practice could be endowed with the force of law, they are not so manifestly opposed to Section 4, Regulation IX. of 1825, as to set that law aside. It is no where provided that the license granted to the Board deprives the Government of its general power of control. It does not necessarily follow that when the Government extended the powers of the Board, they abdicated their own.

In entering upon the determination of what was the practice in regard to the confirmation of farms up to 1844, (on the 27th January of which year the appellants plead that power was given to the Board to grant farming leases, and not sooner) it will be necessary to dispose, preliminarily, of the respondent's objections to the reception of the papers filed with the record as not stamped, and not accompanied by a vernacular translation. The Court hold that such papers need not, as of course, be accompanied by a vernacular translation, though, in the present instance, they ought to have been so accompanied, because, as noticed by the Judge, who granted this review, the vakeel of the respondent, by reason of his not understanding the English language, had no opportunity of replying to them. As respects the necessity of the papers being stamped, respondent quotes Construction No. 773 and Regulation X. of 1829. In the opinion of the Court, Construction No. 773 is not in point. It rules—"the Court are of opinion that, from the rules laid down in Schedule B, Regulation X. of 1829, it appears to have been the intention of Government that both the application for the copy (of proceeding or order) and the copy itself, shall be on stamped paper; the stamp assigned for the application being of a different value from that on which the copy is to be written." Regulation X. of 1829 is, the Court remark, a fiscal law, and under Article XXIII. Schedule A of this enactment, it is laid down that "authenticated copies of any records, letters, accounts, statements, reports, or other writings,

furnished to *individuals* from any of the public offices of Government, shall be written on paper of the size," &c. &c. The Government are not individuals within the meaning of the above law, and, in filing copies of papers, need not have recourse to the provisions of a statute by which a source of their own revenue is created; moreover, a precedent of this Court, dated 3rd February 1851 (Ram Pershad and others, appellants, *versus* the Collector of Goruckpore respondent) is precisely in point. The vakeel of Government put in, in that case, copies of letters on unstamped paper and unaccompanied by a translation; they were accepted by the Court, and were not questioned by any party. Having thus dealt with the technical objections of the respondent, the Court proceed to more important considerations. Not much light is thrown on what was the practice of the Board in regard to these farms up to 1844, by the papers which have been indiscriminately thrust into the *misl* by the appellants. Of the four letters, however, cited by the Court in their former judgment, not one would, so far as the Court can make out, apply. The letter of the 14th September 1832 seems to refer to a transaction of which the origin was anterior to the 5th June 1832. The letters quoted, as of date 10th May 1832 and 3rd June 1833, would appear to be rightly of date 10th May 1833 and 3rd June 1833, the last being an answer to the first, and are apparently not applicable to this case, as the reference was made to Government to farm the estate at a less jumma. Besides which, the orders of 5th June 1832 were circulated by the Board on 30th October 1832, so that not one of the four letters can be received unquestionably. The Court find however that the Government, on 17th March 1837, sanctioned the farming lease of mouzah Moherpore; that on the 28th March 1843 the Government confirmed the farming engagements sanctioned by the Board for the second quarter of 1842-43; that the Government, in a letter of 31st October 1844, in answer to statement of farms under Regulation IX. of 1825 and Regulation VI. of 1795, sanctioned by the Board for the first quarter of 1844-45, confirmed the *latter*, that is, the farms under Regulation VI. of 1795; and this is an evidence that the practice of confirmation by Government ceased at the time stated by the appellants. Further, on the 25th June 1833, the Governor General confirmed the farm of 20 mehals in Bareilly, some of which being for periods less than ten years, and not for a decrease of jumma, are clearly in point, yet further, on the 27th July 1839, the Government confirmed the Report of farming engagements for the first quarter of the current year. Also, a lithographed form is filed with the record, from which it appears that transfers of all descriptions were uniformly reported by the Board up to 1844. Hence, there is quite enough to satisfy the Court that the prac-

tice was, as asserted by the appellants, while the respondent has failed to adduce a single case to prove the contrary.

"Was the annulment of the farm by one member illegal, and if so, is the Government Order thereby rendered a nullity?" The appellant contends that such is its effect, that the single member not having authority to cancel the lease (and the Court find that under the XIVth Rule of Practice he had no such authority) the Government confirmed a nullity in confirming his order for cancelment, and we are thereby thrown back on the original order of the Board sanctioning the lease, so that in point of fact, the lease is sanctioned at the present moment. To expose a fallacy such as this, it is only necessary to hold it up to the broad lights of common sense. It has been ruled above that, under Section 4, Regulation IX. of 1825, the Government had, unreservedly, a power of interference. The Government, on representation made to them, did interfere in this case. The Government had not the less power because a single member of the Board had none. The assumption by the individual member of the Board of an authority beyond the law did not take away from the Government their power to act under the law.

On the above considerations, the former judgment of the Court, dated 8th January 1849, is sustained.

The 24th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 49 OF 1851. { *Regular appeal from the decision of Mohu-
med Kureem-oollah Khan, Principal
Sudder Ameen of Agra, dated 26th
April 1848.*

BHOOP SINGH AND OTHERS, (*Defendants*), *Appellants*;

versus

MR. H. H. BELL, (*Plaintiff*), *Respondent*.

For the reasons stated in case No. 50, decided this day, the former judgment of this Court, dated 8th January 1849, is upheld.

The 24th April, 1851.

Present : { A. W. BEGLIE,
H. LUSHINGTON,
H. W. DEANE, } Judges.

CASE No. 27 OF 1851. { Special appeal from the decision of A.
Lang, Esq., Judge of Allahabad, dated
28th June 1850.

SYED SAFDUR ALI, (Plaintiff), Appellant,

versus

SYED ABOOL QASIM AND OTHERS, (Defendants), Respondents.

THE Judge's report on this case is to be found at page 160 of the printed decisions. It does not state the case exactly, and in particular the Judge appears to have been misled by the decision of this Court noted in the margin. That

* Bukshee Ram,
versus
Sheo Buksh.
11th January 1848.

decision was subsequently reviewed and superseded. The new decision in the case is dated 23rd August 1849, and it declares that the division or separation of interests, in pure *putteedaree* mehals, can be effected only under the provisions of Section 5, Regulation IX. of 1811. By this Section, any *putteedar* in the occupancy of a specific quantity of land in a pure *putteedaree* village may require the Collector to "allot the separate assessment of such share."

The village now in question, mouzah Kaharah Khas, is stated by the Judge to be imperfect *putteedaree*. The particulars, however, recorded in other parts of the decree, in regard to the constitution of the village, render it doubtful, whether the term "imperfect *putteedaree*" has been accurately used. So far as the cultivated lands are concerned, the village appears, from the settlement papers, and by the admission of the parties, to be pure *putteedaree*. There are, according to the *khusreh* and *roobakaree* of settlement, 25th June 1839, 183 beegahs 17 biswahs *shamilât* land, designated "*zemeen mooshturrikeh, baghat, purtee judeed, talao, abadee, bheet, roh, malee,*" and it is the plaintiff's share in the *shamilât*, together with a separate "allotment" of the assessment on his entire holding, which is the object of the present suit. It is true that the plaintiff sues for a division under Regulation XIX. of 1814, but the Court regard this as a very immaterial error. The contents of the plaint show clearly that the plaintiff did not desire a division under Regulation XIX. of 1814. He desired his share of the *shamilât* lands, and separate responsibility.

Although the whole of the 183 beegahs 17 biswahs are recorded as *shamildt*, yet, on a close examination of the *khusreh*, it appeared that 76 beegahs out of the 183 beegahs were entered with specification of the *puttee* to which they belonged, and one field is entered as belonging to *both* the parties to the present suit: without more information than the *misl* supplies, the Court are unable to reconcile these apparently conflicting statements. It is however fairly presumable that the circumstance does admit of explanation, for nothing can be clearer than the statement in the settlement *roobakaree*, that the 183 beegahs 17 biswahs are held in joint tenancy. The Court will consider them to be so, though the fact is not to be understood as one of the points ruled by this decision.

At paragraph 167, Section 3 of the printed Directions issued by Government for the use of the Revenue Department, is the following sentence.

"The law has provided that all co-parceners, or bodies of co-parceners, who wish to free themselves from joint responsibility, and to become sole possessors of their own property, should have the power of claiming the separation of their portion of the estate, and its formation into a distinct estate or mehal."

The Court recognize this as a correct enunciation of the law. The right to a separation is inherent, as the law now stands, in every proprietor. It remains only to determine the manner in which this right shall be exercised. The rules contained in Regulations IX. of 1811, and XIX. of 1814 are applicable to certain known predicaments, amongst which the case before the Court is not to be found; but should any cases unprovided for arise, the manner of effecting the separation must depend upon the specific interest held by the applicant; and this "specific interest," under Section 5, Regulation IX. of 1811, it is the province of the Civil Courts to determine. When this has been done, it is the duty of the Collector, by Section 3, Regulation XIX. of 1814, (which Section has evidently general application) to make the *butwarrah*; but by Section 35, the Government may issue instructions in cases "unprovided for by the Regulations," and some instructions of this nature are found in paragraph 293, Section 5 of the Directions already referred to, which contains these words. "The rules are generally applicable to its performance" (*i. e.*, *butwarrah*) "under orders of the Civil Court, but many of the steps of the process, which are ordinarily submitted to the wishes of the parties, or ruled by the order of the Collector, may come under the cognizance of the Court." The Court has adjudged a certain portion of the estate to be the property of the decreeholders, and is of course bound to see that he is fairly treated.

In the absence, then, of any law directly bearing upon the case, the Court consider themselves fully warranted by the laws and rules above quoted in ruling not only the "specific interest" of the plaintiff, but also the principle upon which the operation of *butwarrah* shall be performed.

In the present case, there is no dispute as to the cultivated lands already held in severalty by the plaintiff, and these will remain in his possession according to the spirit of Regulation IX. of 1811: the principle upon which the *shamilât* land should be divided is stated by the plaintiff, and supported by the settlement *roobakaree*. The nominal 46 beegahs, 3 biswahs and 11 dhoors, claimed by the plaintiff, are what his share in the *shamilât* would amount to if divided in proportion to the quantity of cultivated land already held by him in severalty. His interest in the mehal is measured by the quantity of land in his occupation, not by ancestral shares, and he claims a *proportional* share in the land not yet held in severalty. This is in conformity with the settlement *roobakaree*, which, in allusion to these 183 beegahs 17 biswahs, declares them to be "*mootabik hukeyyat mooshturrik*." The meaning of these words is not beyond dispute, but the Court understand them to imply that each sharer possesses an interest in the *shamilât* proportional to his interest in the rest of the village. The principle is moreover perfectly equitable.

The Court therefore reverse the decision of the Zillah Court, and decree in favor of the plaintiff, appellant, declaring him to be entitled to a share in the *shamilât* lands proportional to the cultivated lands already held by him in severalty, to a separate allotment of the proportional jumma on the estate thus formed, and to the registry of his tenure in the Revenue records, as a distinct and independent mehal.



The 24th April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 189 OF 1849. { *Regular appeal from the decision of Moul-
vee Mohumed Zuhoor, Principal Sudder
Ameen of Ghazeepore, dated 9th June
1849.*

DHOOPUN RAI AND OTHERS, (*Defendants*), *Appellants*,

versus

SYED QASIM ALI, (*Plaintiff*), *Respondent.*

SYED QASIM ALI and Mirza Mohumed Ali, *or* Aka Nuwab, purchased talooqua Beerpore at a public sale held for the realization of arrears of Government Revenue, the share of Qasim Ali being one-third and the share of Aka Nuwab two-thirds. The auction purchasers found the same difficulty in collecting the rents which had been experienced by the fiscal authorities; land was thrown wilfully out of cultivation, and the new proprietors were compelled to have recourse to the Civil Court, where, on the 17th April 1843, they obtained a decree against the former zemindars for Rs. 9,542.

The auction purchasers, now also decreeholders, were no more able to realize the amount of their decree than they had been to collect their rents, and, moreover, they now began to quarrel amongst themselves. The former zemindars, with a view to evade execution of the decree, transferred their shares in other villages, and the plaintiff alleges that Aka Nuwab aided and abetted them in these fraudulent transfers, and supported them in their opposition to the plaintiff, in the hope of thereby securing the whole profits of the talooqua to himself.

Syed Qasim Ali therefore sues all parties for damages, his co-sharer Aka Nuwab, the former zemindars of talooqua Beerpore, and the qabaladars, who had purchased the shares of the Beerpore zemindars in other villages, in all about 200 persons. He claims, as the amount of damages, one-third of Rs. 42,902-8-9, that is to say, one-third of a sum composed of his share of the decree,

17th April 1843, and of the rents of Beerpore from 1247 Fuslee, the year of auction purchase, to 1253 Fuslee. The total rents of Beerpore included in the account filed amount to Rs. 33,356-15-9. The damages thus calculated are laid at Rs. 14,300-13-7.

The plaintiff details the circumstances of the former suit and of the disputes which ensued between himself and his co-sharer on the occasion of the realization of, or rather the attempts to realize, the sum decreed, to both, on the 17th April 1843. He charges this defendant with throwing obstacles in the way of a division, for which he, the plaintiff, had applied, with postponing sales of the former zemindars' property without consulting plaintiff, and asserts that this defendant's object was to prevent the plaintiff from redeeming a certain mortgage held by this defendant, and thus acquire possession of the whole of talooqua Beerpore.

The defendant, Aka Nuwab, denies having in any way interfered with the rights of Syed Qasim Ali, explains that in regard to the execution of the decree and the *butwarrah*, he had exercised only his just rights as a proprietor, and asserts, in his turn, that the object of the plaintiff in bringing this suit is to evade payment of a sum of Rs. 10,576, due to this defendant, under a certain *soolehnamah*, whereby some previous litigation in the Civil Courts had been concluded.

The zemindars of Beerpore have not appeared at all.

Of the qabaladars, 10 persons, holding under eight *qabalas*, answered, in the Principal Sudder Ameen's Court, that the transfers made in their favor were *bona fide* transfers, unconnected with the disputes which existed between the zemindars and the auction purchasers, or between the auction purchasers themselves.

The Principal Sudder Ameen divides the subject very accurately, and lays down the following points for decision.

1stly. Can a suit for damages be brought, as this has been, against all these defendants together?

2ndly. What is the amount of injury sustained by the plaintiff?

3rdly. Are the transfers fraudulent or not?

4thly. Is the defendant, Mirza Mohamed Ali, *oorf* Aka Nuwab, responsible for any part of the damages?

In regard to the first point, the Principal Sudder Ameen is of opinion, that there is no other way in which a suit could be brought against persons accused of conspiring together to injure another.

On the second, adopts the plaintiff's estimate, observing, that he is without question entitled to a third of the decree, and that no objection has been made to the amount of the *wasil bakke* filed by the plaintiff.

In regard to the qabaladars, the Principal Sudder Ameen divides them into two classes: those whose deeds of sale are dated *before* the passing of the decree, 17th April 1843, and those whose deeds are dated *after* that event. The former, he considers to be *bond fide* transfers, effected with some acknowledged purpose, and unconnected with the demands against talooqua Beerpore. The latter, however, he holds to be fraudulent. No necessity for these transfers is apparent; the dates support the supposition that the only object was to evade payment of the decree and of the Beerpore rents; and, finally, it is, in the opinion of the Principal Sudder Ameen, clearly established, by the evidence in the case, that, in these instances, possession of the thing sold was never delivered.

On the fourth point, the Principal Sudder Ameen does not consider that the defendant, Aka Nuwab, has rendered himself liable for damages. The proceedings in the execution of the decree, and in the matter of the *butwarrah*, may have thwarted the plaintiff, but the acts of this defendant were those which a co-sharer was entitled to perform, and cannot render him responsible for damages. This appears to have been the principal point in the suit, but no appeal has been preferred against the decision of the lower Court in regard to it.

From the decision of the Principal Sudder Ameen, two appeals have been preferred. One, by Dhoopun Rai and others, qabaladars of the class, which has been declared to be fraudulent, and another, by Aka Nuwab, who has not been allowed his costs.

Dhoopun Rai and others commence their appeal by raising the usual objection to the form in which the suit has been brought, none of which appear to the Court to be such as should affect the decision. They then go on to declare, as before, that the transfers made to them were *bond fide* transfers, and they, lastly, object to the amount of the damages given against them.

So far as the nature of these transfers is concerned, the Court see no reason to differ with the Principal Sudder Ameen, but they consider the objection of the appellants to the amount of damages to be deserving of attention. The Principal Sudder Ameen by his decision has made the holders of 13 deeds of sale jointly and severally responsible for the plaintiff's share in the decree 17th April 1843, and in the rents of Beerpore from 1247 to 1253 Fuslee. The Court do not consider that the decree and the rent-roll constitute a just measure of the responsibility of the appellants. The qabaladars can have injured the plaintiff only to the extent of the value of the property fraudulently purchased. That value should be the measure of the damages awarded against them. As the ascertainment of this value has not occupied the attention of the Court of first instance, some difficulty has been experienced

in determining it; but enough is to be found in the *misl* to enable this Court to pass a final and equitable order, and to obviate the necessity of a remand. Of the 13 *qabalas*, the holders of which have been declared liable for damages, eight are with the *misl*: the particulars of three more are to be gathered from the petitions of the qabaladars filed with the *misl*: the two remaining are found by the Court, on evidence sufficient for the purpose, to be as follows: 1. Bhoor Rai, qabaladar, Rs. 498, dated 6th January 1847; and 2nd, Moorleedhur, qabaladar, Rs. 100, dated 19th December 1846. The Court hold that for the purposes of this suit, the price entered in the *qabalas* represents the value of the property sold, and this value has been declared above to be the measure of the damages to be awarded against the qabaladars. Under the circumstances of the case, the qabaladars might legally have been declared jointly and severally responsible, but as the value of each transfer is known, there exists no necessity for an order which might bear more heavily upon individuals than upon the whole. The Court therefore declare that the appellants are severally, and not jointly, responsible to the plaintiff for damages to the amount entered in the deed of sale of each as purchase money; but where one deed of sale contains the names of more than one purchaser, then such purchasers shall be jointly and severally responsible to the extent of the purchase money entered in such deed of sale.

The decree of the Principal Sudder Ameen is modified accordingly.



The 24th April, 1851.

Present : { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } *Judges.*

CASE No. 194 OF 1849. { *Regular appeal from the decision of
Moulvee Mohumed Zuhoor, Principal
Sudder Ameen of Ghazeepore, dated
9th June 1849.*

MIRZA MOHUMED ALI, *or* AKA NUWAB, (*Defendant*), *Appellant*,

versus

SYED QASIM ALI, (*Plaintiff*), *Respondent*.

For the particulars of this case see the above decision, No. 189, Dhoopun Rai, &c., appellants, *versus* Syed Qasim Ali, respondent, of this date. Mirza Mohumed Ali has appealed, separately, to obtain an order for costs. These were not allowed him by the Court below, on the ground that the plaintiff had made this appellant a defendant for the purpose of determining plaintiff's share. If the appellant had done any thing amounting to a denial, that the plaintiff was a one-third sharer in talooqua Beerpore, or, if he had disputed the fact in his *juwab dawa*, the refusal to allow appellant his costs might have been maintained. As it is, the Court do not see any good ground for refusing them. Aka Nuwab has not been found to be a wrong doer, and he has never asserted that the plaintiff did not possess the share claimed by him in talooqua Beerpore.

In the opinion of the Court the appellant is entitled to costs, and the decision of the Principal Sudder Ameen is modified accordingly.

The 24th April, 1851.

Present: { A. W. BEGBIE,
H. LUSHINGTON,
H. W. DEANE, } Judges.

CASE NO. 56 OF 1851. { Special appeal from the decision of Doobé
Jowala Pershad, Additional Principal
Sudder Ameen of Azimgurh, dated
28th June 1850.

SHEO DASS, (*Defendant*), *Appellant*,

versus

MUSSUMAT LONGEE, (*Plaintiff*), *Respondent*.

THIS was a suit to obtain division of a one-anna six-gundah share in mouzah Koorlee Joferpore, and a 2-anna 13-gundah share in mouzah Birjla.

The plaintiff represented that there were two *puttees* in these estates known by the distinctive appellations of Hoolas Rai and Bas Rai. The cultivated land, and the houses of the cultivators, had been divided between the two *puttees*, the culturable but waste land, *baghs*, tanks, &c. remaining in common, the *putteedaree* system of revenue management prevailing in *puttee* Hoolas Rai, of which plaintiff is a co-parcener, and the *beegahdaree* system obtaining in the Bas Rai *puttee*. Plaintiff further states that at the time of the division being made by the Officers of Government, no land marks were erected, and that, consequently, the boundaries of the several fields had fallen into confusion, (*khult mult ho गया*) she sues therefore to obtain a fresh division both of the cultivated and uncultivated lands.

The Moonsiff decreed in favor of plaintiff, with a proviso, that the new division should not in any way interfere with the division previously made of the cultivated land. This decision was upheld in appeal by the Additional Principal Sudder Ameen.

A special appeal was admitted to determine, "whether the plaintiff ought not to have been nonsuited, her claim to have a new division of the entire estate, under the circumstances of the case, being untenable: also, whether the decisions of the Moonsiff and Principal Sudder Ameen are not inconsistent with the claim asserted by the plaintiff."

The Court are of opinion that the suit of the respondent is irregular, and entails on her the penalty of nonsuit, it being admitted by her that a division of the cultivated lands had already been

regularly effected by the Revenue Authorities. She was not at liberty to bring a suit to effect a *new* division, nor do the circumstances of the original division having fallen into confusion, and the common possession of the uncultivated portion, afford sufficient ground for the institution of such a claim. If, as alleged by the respondent, or rather, as is to be inferred from her petition of plaint, she has been dispossessed of any portion of the land allotted to her by the division, she was at liberty to sue for the recovery of the same, it resting with her to point out the lands of which she has been dispossessed. If, on the other hand, she desired to obtain separate possession of her portion of the undivided land, the Court was equally open to her. But she cannot sue (as she has most clearly done) for a fresh division of the entire mouzah, and the attempt of the lower Courts to reconcile their decree in the respondent's favor, with the recognition of the existing division, involves a contradiction. There is such a studied ambiguity in the petition of plaint, that it is not easy to ascertain what the real object of the suit is, but it certainly may, without any forced construction, be understood to claim a redivision of the entire mouzahs, a meaning which, though disavowed by the respondent, is still attached to it by the appellants.

The decisions of the lower Courts are reversed, and the respondent nonsuited.

The 24th April, 1851.

Present: { A. W. BEGGIE,
H. LUSHINGTON, } *Judges.*
H. W. DEANE, }

CASE No. 57 OF 1851. { *Special appeal from the decision of Doobé
Jowala Pershad, Additional Principal
Sudder Ameen of Azimgurh, dated
28th June 1850.*

SHEO DASS RAI, (*Defendant*), *Appellant*,

versus

PURMA RAI AND OTHERS, (*Plaintiffs*), *Respondents.*

THE circumstances of this case are identical with those of case No. 56, this day disposed of, and a special appeal was admitted, and the decisions of the lower Courts reversed, on precisely the same grounds. It is unnecessary therefore to do more than refer to that decision.

The 1st May, 1851.

Present: H. W. DEANE, Judge.

CASE NO. 132 OF 1849. { *Regular appeal from the decision of
Mohumed Zuhoor, Principal Sudder
Ameen of Ghazeepore, dated 7th
March 1849.*

BHOWANNER BISSASHUR PERSHAD SINGH, (*Plaintiff*),

Appellant,

versus

SOOFUL SINGH AND OTHERS, (*Defendants*), *Respondents.*

THE suit is brought to obtain possession of mouzahs Moondeeree and Mullooh, appertaining formerly to the *jageer* of Kesho Baboo, in zillah Ghazeepore, and to recover *wasildat*, from Jeyt 1252 to 1254 Fuslee, amounting to Rs. 5,766: the full value of the claim is Rs. 9,768-8-6.

Mouzahs Moondeeree and Mullooh are bordered by a village named Chorekund, and the inhabitants of the latter, finding themselves injured by encroachments on the part of certain of the proprietors of Moondeeree and Mullooh, sued them, and, in February 1836, obtained a decree against them. In 1841, on the resumption of the *jageer* of Kesho Baboo, mouzahs Moondeeree and Mullooh were brought under settlement; a *furd putteedaree* was drawn out, in which the interest of the several sharers were specified, Munogee Lall, a *qanoongoe*, being appointed, with the consent of the community, a referee in case of disputes. The proprietors of Chorekund afterwards put in execution the decree they held, and brought to sale the rights of such of the sharers of mouzahs Moondeeree and Mullooh as had been cast under the decree. The plaintiff, in 1845, became the purchaser. He objects to the *furd putteedaree* drawn out at settlement, and claims to be recorded sole owner in virtue of his purchase.

A genealogical table is produced by the defendants, showing their descent from the original proprietor, Hut Suhai. The plaintiff is himself a sharer in the mouzahs, as heir of Roop Suhai, one of the sons of Hut Suhai. It is urged, that the plaintiff cannot take exception to the specification of shares made out at the settlement, for not only was it prepared before the purchase took place, under which this claim is preferred, but was assented to by the plaintiff himself in his capacity of sharer, as heir of Roop Suhai, as above. Nor assented to only; it was pleaded

by the plaintiff in his own favor, in answer to a claim which Sirbdowan Singh and others brought for a share in the mouzahs, and which was dismissed by the Judge, in appeal, in June 1844. The sale of the rights of those sharers, against whom the zemindars of Chorekund got their decree, cannot, it is pleaded, affect the interests of the remaining proprietary body. The Principal Sudder Ameen pronounced the plaintiff entitled to an eight-anna share in the mouzahs, with proportionate *wasildt* from the date of decree. The claim to *wasildt* for past years was rejected.

The lower Court has taken, as the basis of its adjustment of the matter in dispute, the *furd tufreek* of the settlement, and, comparing it with the sale papers, has awarded to the plaintiff a proprietary title to the interests, as defined in the *furd tufreek*, of those against whom the sale process was carried out. Against a determination so obviously equitable can only be pleaded, as has been pleaded, the utter worthlessness of the *furd tufreek*. The sufficient answer to this plea, however, will be found in the fact, which has been established in defence, and noticed above, that the plaintiff, when made a defendant at the suit of Sirbdowan Singh and others, rested his opposition on the correctness of this very document. The defendants have shown that he appealed to it when a purpose was to be served by proving it valid. Now that he finds it to stand in his way, he asserts that it has been prepared fraudulently.

Besides the objection to the *furd putteedaree*, which has been renewed in appeal, the plaintiff contends that he purchased, at the auction sale, the rights of one Gunga Singh, whose name has been changed by the defendants to Gunga Ram Singh, with the view of exempting him from the operation of sale. The reason assigned by the plaintiff for the change is, that, whereas there are several sharers in the estate of the name of Gunga Singh, only one is possessed of any considerable interest, and his rights, which ought to have passed to the plaintiff, are still reserved to him under the name of Gunga Ram Singh. The averment is not made good on examination of the record, the decree had by the zemindars of Chorekund is found to include three persons, by name, Gunga Singh, and the rights of three persons, bearing that name, having been duly made over to plaintiff. It is true that the *koorseenamah* put in at settlement gives four persons by name Gunga Singh, as heirs of Roop Suhai, and does not exhibit what the *hissehkushee*, drawn up at the same time, (12th October 1841), exhibits, viz., a person by name Gunga Ram Singh, as heir of Chuttergung:—why the two papers should differ in an important particular is not explained, unless it be, that the *koorseenamah* now given in is the document which was alluded to by the arbi-

trator Munogee Lall, when, as shown by the record, he intimated to the Collector that a certain *koorseenamah*, which had been made out, was not correct, and that an accurate table of descent would be prepared at a future time. But independently of any direct proof that the defendants have perpetrated the fraud imputed to them, the Principal Sudder Ameen, in noticing the point in his judgment, clearly demonstrates, that Gunga Ram Singh is not one of those whose rights have passed into the plaintiffs' hands, because this very Gunga Ram Singh joined with Soopul Singh and others in a suit in 1847, for division against the plaintiff, without any objection to his right of action being taken by the plaintiff. Had the plaintiff been able to say that he had previously purchased the rights of the person suing him, it is not to be supposed that so very sufficient an answer would not have found a place in his reply to the plaint. Yet no such plea was raised, and the suit terminated in 1848, in favor of Gunga Ram Singh, and those associated with him. It is also urged, in appeal, that Koloo Singh, one of the defendants, who at first joined others of the defendants in an *ikbaldavee*, was afterwards allowed to retract; but I agree with the Principal Sudder Ameen in thinking that the *ikbaldavee* was not voluntarily made. I further concur with the Principal Sudder Ameen in holding that the plaintiff's claim to *vasilat* for past years is sustained by no proof whatever. There exists, therefore, no reason for disturbing the judgment of the Court below, and the appeal is dismissed.

The 6th May, 1851.

Present: H. W. DEANE, Judge.

CASE NO. 202 OF 1850.	{	<i>Regular appeal from the decision of Mr. J. Mercer, Principal Sudder Ameen of Furruckabad, dated 9th August 1850.</i>
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MOHUN LALL AND THAKOOR DASS, (Plaintiffs), Appellants,

versus

MUSSUMAT GHRESMA AND OTHERS, (Defendants), Respondents.

THE object of this suit, which has been brought by the plaintiffs as paupers, is to establish a reversionary title to one-half of the entire property formerly belonging to chowdhree Oodey Chund, and to prevent the alienation of his estates in favor of chowdhree Jey Chund, adopted son of Indurjeet, who was the only son of

Oodey Chund. Chowdhree Oodey Chund, who died thirty-four or thirty-five years ago, leaving large landed property, had three wives; by his first wife, he had a daughter, with whom Sheo Subhai, father of the plaintiffs, intermarried; by the defendant Thakoorain Sahiba, another wife, he had a son named Indurjeet, who died in 1825, without issue; by his third wife, he had two daughters, Holasa and Bilasa, who are also made defendants in this action. It is contended that within twelve years from the date of suit chowdhree Jey Chund has been recorded in the Collector's books as son, by adoption, and heir of Indurjeet, and that such record furnishes a cause of action to the plaintiffs, inasmuch as it constitutes an interference with the legitimate evolution of Oodey Chund's property, half of which would, but for the adoption complained of, eventually descend to the plaintiffs, and half to the offspring of Oodey Chund's third wife.

It is stated, in defence, that on the death, in 1825, of Oodey Chund's son, Indurjeet, as above, his widow, Maharanee, succeeded, and that Maharanee, with the previously obtained consent of her husband, adopted the defendant, Jey Chund, in 1890, of the Sumbut year, or eighteen years prior to the institution of the suit. Maharanee survived her husband about twelve years, and the estates then passed to Thakoorain Sahiba, mother of Indurjeet. With respect to a suit alluded to in the plaint, brought by the plaintiffs on 25th September 1837, for a portion of the property left by Oodey Chund, and decided by *raseenamah* on the 7th June 1838, it is urged by the defendants, that the plaintiffs expressly admitted, on that occasion, their knowledge of the adoption of Jey Chund two years before, or in 1835. That suit resulted in a *raseenamah*, on the defendant Thakoorain Sahiba agreeing to make an allowance to the plaintiffs at the rate of one rupee per diem.

The Principal Sudder Ameen has dismissed the claim, as barred by the limitation law.

The rejection of the claim by the Principal Sudder Ameen is undoubtedly correct. Some stress has been laid both in the judgment of the Principal Sudder Ameen, and in the pleadings in defence, on the failure of the plaintiffs to institute the present action within twelve years from the date of Indurjeet's death, but I think unnecessarily, because, if the widow of Indurjeet Maharanee, and after her, Thakoorain Sahiba, had a title to succeed preferable to any which the plaintiffs could set up, no cause of action was offered to the plaintiffs during the life-time of Maharanee and Thakoorain Sahiba, unless on the special ground that their reversionary interests were effected by some act similar to that now complained of. The plaintiffs cannot maintain, how-

ever, as they are disposed to maintain, that the suit is within the legal limit, because brought within twelve years from the date of the decision, by *razeenamah*, of their suit in June 1838, for it is obvious that any suit, founded on an alleged non-fulfilment of the agreement then entered into, must be restricted in its object to an enforcement of the payments then promised, and said to be now withheld. It was not, as the plaintiffs desire to make out, a condition of that agreement, that neglect to provide the stipulated maintenance should throw open the question of Jey Chund's adoption. So far from it, the present demand is vitiated rather than favored by what was then done, since it might be held, not unreasonably, that any cause of action arising out of the adoption of Jey Chund was extinguished by the result of that suit. Even if it be allowed, however, that the question of the adoption has not already been finally disposed of, then certainly the present cause of action is not the record of Jey Chund's name in the Collector's books, but the act of adoption itself. The adoption is the act which, while it endowed Jey Chund with all the rights and privileges of a son actually born to Indurjeet, cut off from the plaintiffs the prospect of eventual succession under a division of Oodey Chund's entire property between his daughters and their issue. That this adoption took place in 1835 has been averred by the plaintiffs in 1837, as a fact within their knowledge, consequently, a suit brought on the 12th April 1850, as this has been, with the object of setting the adoption aside, is not brought within the period prescribed by law. The appeal is dismissed.

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The 10th May, 1851.

Present: A. W. BEGGIE, Judge.

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CASE No. 92 OF 1851. { *Special appeal from the decision of
 J. S. Clarke, Esq., Judge of Azimgurh,
 dated 14th January 1851.*

ISHREE RAI AND OTHERS, (*Plaintiffs*), *Appellants*,

versus

SURNAM RAI AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case will be found at pages 3 and 4 of the printed decisions for Zillah Azimgurh, for the current year. Both parties appealed to the Judge from the decision of the Additional Principal Sudder Ameen; the plaintiffs being dissatisfied at having a portion of their claim dismissed, and the defendants at a portion being decreed against them. In appeal

the Judge upheld that part of the Principal Sudder Ameen's decision which was unfavorable to the plaintiffs, and reversed that part which was favorable to them. In other words, he dismissed the plaintiff's claim *in toto*. From this decision a special appeal was preferred by the plaintiffs and admitted on the following grounds.

"I admit a special appeal to determine, whether the Judge was warranted in partially reversing the decision of the Additional Principal Sudder Ameen without recording a fuller statement of the reasons upon which his decision is grounded."

The Court observe that the Additional Principal Sudder Ameen has recorded at considerable length his reasons for decreeing as he did. On the other hand, the decision of the Judge is so extremely concise, that it is utterly impossible for this Court to decide, on inspection of the two decrees, which of the two is the correct one.

In his decision on the *defendants'* appeal, the Judge refers to his decision on the *plaintiffs'* appeal, for his *reasons* for dismissing the plaintiffs' suit *in toto*. On referring to that decision, I find the *whole* of the Judge's *reasons* comprised in the following brief sentences. "The documents filed by the defendants substantiate the facts of the case as above narrated, and the whole of the circumstances seem to favor the right of the defendants. The plaintiffs put forward no evidence, documentary or oral, to satisfy me as to their title to any of the four gardens claimed by them, and in the absence of more convincing proof on their part, I concur in the decision arrived at by the Principal Sudder Ameen, so far as the appellants are concerned in the present instance, and dismiss the appeal with costs." This style of decree is equally unsatisfactory to the losing party and to this Court, which has to determine as to its justice. There is not the slightest attempt at argument; no *reasons* (strictly so to speak) given in refutation of the arguments of the Principal Sudder Ameen; and without these, it is impossible in the Court of ultimate appeal to record any opinion on the merits of the case. In a precedent of the

* Dwarkanath Bose, petitioner,
20th April 1850.

Calcutta Sudder Court noted in the margin* the following wholesome rule is laid down by two of the Judges of that Court, viz., "that a decree of a lower Court is not to be set aside without a full statement and consideration of all the reasons upon which it is grounded." The present decision certainly does not fulfil the above requirement, and it is accordingly annulled, in order that the Judge may reconsider his decision, and record a fresh judgment, setting forth his reasons in detail for disapproving of that part of the Principal Sudder Ameen's decision, which is favorable to the plaintiffs, should he, on reconsideration, see no reasons for coming to a different conclusion.

The 13th May, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 25 OF 1851. { Special appeal from the decision of
Moulvee Mohumed Hussun Khan,
Principal Sudder Ameen of
Bareilly, dated 31st May 1850.

NUJEEB KHAN, (*Defendant*), *Appellant*,

versus

MUJJOO KHAN, (*Plaintiff*), *Respondent*.

THIS was a suit to obtain possession of one-sixth of the *zemindaree* of Khidowra, &c., six villages, agreeably to a *byenamah* executed by the defendants, Mohumed Syed Khan and Syed Mohumed Khan, in favor of the plaintiff, under date 22nd September 1849. The defendants, Mohumed Syed Khan and Syed Mohumed Khan, filed an *ikbaldawa*. The defendant, Nujeeb Khan, objected that the said *byenamah* was fraudulent and invalid, inasmuch as the *dakhil kharij* of the estates had been prohibited by the Court, and the *byenamah* had been fabricated, in order to prevent him (Nujeeb Khan) from realizing the amount of a money decree, which he had obtained against the sellers, Sijeed Khan, Syed Mohumed Khan and others.

The Moonsiff was of opinion that the transfer was fraudulent and collusive, and, consequently, invalid, for the reasons stated by the defendant, Nujeeb Khan, and dismissed the plaintiff's suit. In appeal, the Principal Sudder Ameen took quite a different view of the case, and passed a decree in the plaintiff's favor.

A special appeal was admitted to try, 1stly. "Whether the Principal Sudder Ameen is not in error in ruling that the transfer of the estate by the defendants, Mohumed Syed and Syed Mohumed, to the plaintiff, Mujjoo Khan, was not barred by the prohibition of *dakhil kharij* contained in the Moonsiff's *rooba-karree* of the 13th September 1849, in the case of Nujeeb Khan, plaintiff, *versus* Mohumed Russool Khan and others, defendants. 2ndly. Whether (admitting the *legality* of the said transfer) the Principal Sudder Ameen's decision be not incomplete, inasmuch as he has recorded no opinion relative to the alleged collusive nature of the transfer, the fact of such collusion having been found by the Court of first instance."

In regard to the first point of the certificate, I am of opinion, that had the proceedings of the Moonsiff, under date 13th

September 1849, been in all respects *complete*, it would have rendered the subsequent transfer to the plaintiff invalid, for although the application of the plaintiff was confined to the prohibition of the *dakhil kharij* in favor of the son of Russool Khan, (one of the defendants in the other suit), the order of the Moonsiff was *general* and prohibited *any dakhil kharij whatsoever*. The plaintiff in that suit was then aware or apprehensive of a *particular* transfer, and made this only the ground of his application, and in this respect his proceeding was quite regular. But the respondent's vakeel now urges, that the simple fact of the Moonsiff having addressed a *roobakaree* to the Collector to prohibit the *dakhil kharij*, is not sufficient to invalidate a transfer made in opposition to the Court's mandate, and that it was incumbent on the Moonsiff to issue a proclamation of attachment, under the provisions of Clause 2nd, Section 5, Regulation II. of 1806, which was not done. I admit the force of this argument. The words of the law are, "the attachment in such cases shall be made by a written order of the Court to be read and proclaimed upon the spot, and to be affixed in some conspicuous situation at the place where the property is situated; *after which*, any private alienation of the property sequestered, whether by sale, gift, or otherwise, during the continuance of the attachment, shall be deemed illegal and void." Now, it is clearly proved, that the Moonsiff did *not* issue the required proclamation of attachment, and the transfer made by the defendants, Mohumed Syed and Syed Mohumed, to the plaintiff Muijoo Khan, was not therefore "illegal and void."

But, with regard to the 2nd point in the certificate, I am of opinion, that the decision of the Principal Sudder Ameen is, for the reason therein stated, incomplete and unsatisfactory. The Moonsiff having expressly ruled that the transfer was fictitious, fraudulent, and collusive, it behoved the Principal Sudder Ameen also to express an opinion on this point; which he has not done. He seems to think, that because the property had not been *attached* in the manner prescribed by law, any transfer, however collusive, was allowable, and must be upheld: a conclusion obviously erroneous and incompatible with the requirements of justice. The Principal Sudder Ameen has overlooked Construction No. 1299, and other authoritative precedents, which recognize the principle, that no collusive or fraudulent transfers of property, made with the view of evading satisfaction of judicial decrees, shall be deemed to be valid.

I accordingly annul the decision of the Principal Sudder Ameen, and remand the suit, in order that he may pass a fresh decision, with advertence to the foregoing observations.

The 12th May, 1851.

Present: H. W. DEANE, Judge.

CASE NO. 67 OF 1849. { *Regular appeal from the decision of
Nuwab Abdoollah Khan, Principal
Sudder Ameen of Meerut, dated 8th
January 1849.*

SAADUT ALI AND OTHERS, (*Plaintiffs*), *Appellants*,

versus

HUR GOPAL AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this claim are given in the printed decisions of the Sudder Dewanny Adawlut for July 1848, at page 272.

The plaintiffs having been three times nonsuited in the lower Court, at length obtained a decree in their favor. The Sudder Court, on appeal, preferred by the defendants, remanded the case, on the 31st July 1848, for fuller investigation. The order then made is in the following terms. "With reference to the fact, that the defendants are in possession, and to their positive assertions that they hold possession under the title they derived by purchase from Sabut Ali, who had held the property *separately and as his own* for years previous to the transfer of the said property to them, so that the suit, as the defendants affirm, is barred by the statute of limitation, it was clearly the duty of the lower Court to have taken notice of this very important point, and to have determined what evidence the plaintiffs had adduced to show that, within the limit allowed by law, they, the plaintiffs, had held joint possession of the *several plots* of ground and *buildings* from which they now desire to oust the defendants. In fact, after considering all the pleas urged by both parties, it was the duty of the Principal Sudder Ameen to have decided how far, and in what manner, the plaintiffs had proved their claim, with reference to the counter-pleas and counter-evidence adduced by the defendants. All this has been entirely omitted by the Principal Sudder Ameen. The case is consequently so incomplete, that the Court are under the necessity of remanding it for re-trial to the file of the Principal Sudder Ameen, who will proceed to the adjudication of the suit, with due advertence to the above remarks."

The Principal Sudder Ameen has now dismissed the claim of the plaintiffs; and they appeal accordingly.

The suit is brought for partition of the entire *serai* ; it has, however, for its object, especially, the annulment of a sale to the defendants, Hur Gopal and others, by Sabut Ali, of a portion of the *serai* (1200 yards) the plaintiffs pleading joint possession with the defendants, while it is urged, on the other side, without denying the ancestral title of the plaintiffs, as owners of half the *serai*, that separate possession of his share, in which the above 1200 yards are included, has been had by Sabut Ali, so as to render the transfers of his share, which have from time to time taken place, sometimes by forced sales, sometimes voluntarily, independent of any consent on the part of the plaintiffs.

The Principal Sudder Ameen, in deciding against the claim of the plaintiffs, has remarked that the fact of possession by each party, of specific portions of the *serai*, has been clearly established, no objection having been offered when, on some occasions, a part of the ground was sold as belonging to the plaintiffs, and when, on other occasions, a part of it was sold as belonging to the defendant Sabut Ali. A division, partial at least, was admitted by the plaintiffs, in a petition presented to the *tehseeldar* on the 10th August 1835, by Saadut Ali and Murdan Ali, and, in the opinion of the Principal Sudder Ameen, the plaintiffs have failed to prove joint possession within the legal limit of those plots of ground which have passed from time to time to the defendants, Hur Gopal and others. Their pleas are unsupported either by documentary or oral evidence. Kesho Ram, who built a house on a portion of the ground, has been styled by the plaintiffs their own *ryots*, and has not been designated the *ryot* of both parties, which expression would have been used had the parties held jointly, and a *hissanamah*, executed by Kesho Ram for 2000 yards of ground, half of which was the property of the plaintiffs and half of the defendants, assigned to each party payment of a specific amount. In fine, it being clearly indicated that for many years the plaintiffs had recognized the separate possession of Sabut Ali, and the frequent alienations of parts of the property as his exclusive share, the Principal Sudder Ameen rejected the claim.

In this judgment I concur. The chief documentary evidence proffered by the plaintiffs is as follows:—

Record of the suit brought by Kulloo and others to recover possession of half of Sabut Ali's share, dismissed on the ground of the dispossession of the plaintiffs.

A *keraienamah* by Kesho Ram, dated March 1839, under which he binds himself to pay a certain amount of rent to Saadut Ali and Murdan Ali, on the one side, and to Hyder Ali (father of Sabut Ali) on the other.

An *ikrarnamah* of the same date, executed by the lessors in favor of Kesho Ram.

A *ryotnamah* written in May 1835, by Nutthoo, in favor of Sabut Ali.

A *kismutnamah* dated 1200 Hijree.

Ishtehar of sale, in 1841, showing that, on the sale of Sabut Ali's property, the Judge, on objection made by Kulloo and others, directed that his right and interest only should be put up to sale.

In the above there is little or nothing which helps the case of the plaintiffs. The effect indeed, of most of the documents is to favor the other side. The order alluded to as having been passed by the Judge on the occasion of sale was clearly an order of course.

Among the documentary evidence tendered by the defendants, the most material papers are as underneath.

The *kismutnamah*, as above, of 1200 Hijree.

Urzee of Murdan Ali and Saadut Ali, dated 28th March 1841. (It was however transmitted by *dāk*, and is open to the objections to its reception which the plaintiffs have made).

A document in which Kesho Ram is spoken of by the plaintiffs as their *ryot*.

Supurdnamah of 16th October 1839, showing that certain persons are specifically named as the *ryots* of Sabut Ali on the occasion of sale of a portion of his property.

Record of the dismissed suit by Kulloo and others.

Document showing that property belonging to Saadut Ali, plaintiff, was sold, and that Sabut Ali, defendant, put in no objection.

Deposition on 10th August 1835, of Murdan Ali and Saadut Ali, before the *tehseeldar*, wherein Saadut Ali stated distinctly that part of the *serai* was divided and part not divided, and that he had no claim on the share of Hyder Ali (father of Sabut Ali).

The admission contained in this last given document, of which the genuineness is free from question, would of itself be fatal to a claim which brings within its scope a partition of the entire *serai*. In regard to the plot of 1200 yards, sold by Sabut Ali to the defendants Hur Gopal and others, the plaintiffs have altogether failed to show joint possession thereof, or interest therein; on the contrary, there is good reason to hold that, in conformity to a division agreed on, that plot of ground fell, among many others, to the share of Sabut Ali, and that he remained in exclusive possession of it; the plaintiffs, therefore, can no more set up a right of property in this portion of Sabut

Ali's share than in the buildings and other ground which went to make up the rest of his share, and which, as the record of the case shows, have passed away from him at different times as his recognized property, without opposition offered by the plaintiffs. The appeal is dismissed.

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The 20th May, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

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CASE No. 254 OF 1850. { *Special appeal from the decision of*
 Mohamed Luteef Khan, Principal
 Sudder Ameen of Goruckpore, dated
 13th August 1850.

PUDARUT DASS AND OTHERS, (*Defendants*), '*Appellants*,

versus

FUTTEH ALI AND OTHERS, (*Plaintiffs*), '*Respondents*.

THE particulars of this case are as follows. Mussumat Huneefa and Mussumat Huleema obtained a decree for certain landed property against Ashruf Ali in 1825. The rights of Ashruf Ali, consisting of this landed property, were sold by public auction, in 1832, in satisfaction of another claim, and were purchased by the ancestors of the present defendants. Mussumat Huneefa and Mussumat Huleema sued out execution of their decree, and their case was struck off in 1841, by reason that the auction purchasers were in possession, and were not made defendants in the case of execution of decree. Futteh Ali and others, heirs of the decreeholders, now sue the auction purchasers.

Their claim has been recognized by both the lower Courts. It has been ruled by the lower Courts that an objection raised by the auction purchasers, that the suit is barred, is not valid, because the legal period is calculable from 1841, the year in which the application to execute the decree held by Mussumat Huneefa and Mussumat Huleema was finally disposed of, and, consequently, the present suit, brought on the 5th September 1848, is within the time allowed by law.

A special appeal was granted to determine, whether the suit of the plaintiffs is not barred by the statute of limitation.

The Court are of opinion that the judgment of the Courts below cannot be maintained. The defendants have held uninterrupted possession since 1832, under a title, the honesty of which is beyond question, since it was acquired by auction purchase. The time occupied in suing out execution of the decree of the plaintiffs, in the Miscellaneous Department, cannot be counted against the twelve years within which an action must be instituted; and this doctrine has been laid down in various precedents of this Court. The suit is therefore barred by lapse of time.

The decisions of both the lower Courts are annulled, and the claim of the plaintiffs is dismissed.

The 21st May, 1851.

Present: { A. W. BEGBIE, } *Judges.*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 255 OF 1851. { *Special appeal from the decision of*
 Ruzzee-ooddeen Khan, Principal Sud-
 der Ameen of Allygurh, dated 28th
 August, 1850.

MR. JOHN NICHTERLEIN, (*Plaintiff*), *Appellant*,

versus

SOOKH RAM AND OTHERS, (*Defendants*), *Respondents.*

IN this case the plaintiff, having obtained a decree for money against Toolsee and others, proceeded to execute it, and attached the property of his debtors. Sookh Ram then brought a suit against Toolsee and others on the strength of a deed by which the attached property was shown to have been previously assigned to him, and got a decree in his favor by confession of judgment on the part of Toolsee and others. In execution of his decree, Sookh Ram brought to sale the property in dispute, and purchased it himself. The plaintiff then applied to bring to sale the property of the other debtors under his decree. Sookh Ram came forward as objector: Sookh Ram then sold his decree to Salik Ram. It was put in execution by Salik Ram, and Salik Ram brought to sale the property of the other debtors. The plaintiff then sued to set aside the decree had by Sookh Ram, and made over, as above, to Salik Ram: the Court of first instance

gave a decision in his favor, but, in appeal, he was nonsuited by the Judge, who referred him to Construction No. 1299. The plaintiff sued again, and, in conformity to the suggestion thrown out by the Judge, based his claim on Construction No. 1299. The Moonsiff has dismissed his suit, on the ground that Construction No. 1299 rendered it imperative on the plaintiff to satisfy his demand out of other property yet in the possession of his debtors. This decision of the Moonsiff has been upheld in appeal by the Principal Sudder Ameen.

A special appeal was granted to try if the lower Courts have not misunderstood the purport of Construction No. 1299.

The Court find the view taken by the lower Courts of this Construction to be erroneous. The Construction does not prohibit the institution of a suit to set aside a fraudulent alienation so long as a party cast under a decree may have other property not alienated, but simply points out the remedy open to a suitor when it may so happen that a defendant, with a view to evade the execution of any decree that may be eventually passed against him, transfers away his whole property by confession of judgment on a fictitious claim upon him. In the present instance, there would not appear to have been any incorrectness in the course pursued by the plaintiff when he was nonsuited by the Judge. His renewed suit has been professedly founded, with reference to the Judge's order in the nonsuited case, on Construction No. 1299, but it is brought in reality to try this issue, viz. whether the property originally attached and ordered for sale, in satisfaction of the plaintiffs' decree, has or has not been collusively assigned over to Sqokh Ram. That is the issue which the lower Courts have now to try, and on the finding thereon had, will the result of the present action depend.

The judgments of both the lower Courts are set aside, and the suit is sent back for retrial to the Moonsiff's file, with reference to the foregoing remarks.



The 21st May, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 37 OF 1850. { Regular appeal from the decision of Mr.
 J. Campier, Principal Sudder Ameen
 of Mirzapore, dated 8th February
 1850.

SAWUL SINGH, (*Defendant*), *Appellant*,

versus

MUHUNT PURSRAM GIR, (*Plaintiff*), *Respondent*.

THE following is a transcript of the decision of the Principal Sudder Ameen, which contains a full detail of the circumstances of the case, and the reasons which influenced the lower Court to pass a decision in favor of the plaintiff's claim.

" Claim, Rs. 6,870-8-2, principal and interest, due on a mortgage bond, dated 17th September 1846, and a *rooqah*, or note, dated 22nd January 1847, executed by Mr. Siddell.

" In this case, the plaintiff states to this effect. That the late Mr. William Siddell borrowed from him Rs. 5,000, on the 17th September 1846, on the mortgage of two bungalows, a screw-house, and compound, appertaining to them, possessed by him, situated in Imambarrah and Loheea Tolah, and executed a mortgage bond for the same, promising to repay the money in one year, with interest at 14 annas per cent. per mensem; that he had also stipulated, at the same time, not to alienate the mortgaged property till the money lent had been liquidated: that afterwards, namely, on the 22nd January 1847, he had borrowed the further sum of Rs. 500, under a *rooqah* or note, which had been granted by him, wherein he had promised to repay the same in two months: that these sums are entered in his *buhce khata* accounts; that before the expiration of the period limited in the mortgage bond, the said Mr. Siddell had demised, in consequence of which an inventory of his property was made under the superintendence of the Principal Sudder Ameen: that on that occasion he (plaintiff) had submitted an application to him dated 12th June 1847, wherein he made known his claims in respect to the property pledged to him, and prayed that it be not sold or alienated till they were satisfied; that afterwards, at the request of the said officer, he laid his mortgage bond before him; that when the papers connected with the inventory of the deceased's property were transmitted to the Judge's Court, he

presented another application at the Court to the same effect, dated 29th July 1847, on which occasion the Judge was pleased to direct that the application in question, together with his, (plaintiff's), alleged mortgage bond, be transmitted to the Supreme Court: this was accordingly done: in the meantime, that is, on the 20th September, same year, unknown to him, the effects of Mr. Siddell, deceased, were sold by auction, and the defendant was aware of his claims on these houses, yet he purchased them; that no notification of auction sale, particularly in regard to them, had taken place; that the Supreme Court took no steps for the payment of the money due to him; that defendant, as the purchaser of the rights and interests of Mr. Siddell, deceased, in the houses pledged to him, has succeeded to his liabilities connected with them, hence he had instituted this suit against him.

In his defence, defendant does not deny having purchased these houses by auction sale; he, however, contends, that plaintiff ought to have sued separately under the mortgage bond, and separately under the *rooqah* or note; that he had not made the deceased's heir a defendant in the case; that under an order of the Judge, he (plaintiff) had not preferred his claim in the Supreme Court. The defendant next proceeds to state what steps are usually taken in regard to property left by British subjects on their demise, pointing out certain regulations respecting the same, and stating that plaintiff had not obtained a *sunnud* or probate in regard thereto, hence his claim ought not to be admitted, as also that the property in question was sold by auction as *lawaris* or unclaimed, hence he, (defendant), cannot be considered in the light of a successor to the property left by Mr. Siddell, deceased.

From the evidence adduced in the case, both documentary and oral, under my proceeding of the 15th June last, and what the parties have urged in their respective pleadings, an abstract whereof is given above, I am of opinion that the questions chiefly for determination in this case are as follows.

1st. Whether the plaintiff ought or ought not to have sued separately under the mortgage bond, and separately under the *rooqah*: in one or the other case, whether the claim ought to be instituted in this district or in the Supreme Court in Calcutta.

2ndly. Whether he (plaintiff) should or should not bring in the heir of Mr. Siddell as a defendant in the case.

3rdly. Whether the money claimed is or is not actually due to plaintiff, as also whether the late Mr. Siddell had borrowed it on the mortgage of these houses as, asserted by plaintiff, or not.

4thly. Whether the defendant, as purchaser of these houses, is or is not liable for the money claimed by plaintiff.

" On the first point, it appears to me that the *rooqah* has some connection with the mortgage bond ; that the sum borrowed under the latter bond is mentioned in the former, hence there can be no objection to plaintiff instituting his suit in the manner he has done for the recovery of money due under both these bonds. This point being disposed of, it remains to consider whether the plaintiff's claim is rightly instituted in this district or not. To me it appears that the houses in question are situated within the jurisdiction of this Court, and both parties are residents therein, the claim is therefore rightly instituted in this district.

" On the second, it appears that as there are no heirs of the late Mr. Siddell forthcoming, it is not necessary that plaintiff should hunt after them, and make them defendants in the case: the deceased being a British subject, and dying intestate, and no heirs appearing to claim the property left by him, the Registrar of the Supreme Court, under Letters of Administration from that Court, obtained control over it, and that, under his orders, the houses in question were sold by auction, and purchased by defendant for Rs. 5,366. Had there been any heirs of the deceased, no doubt they would, under the authority of the Supreme Court, have administered to the effects left by him.

" On the third, it appears to me that the money claimed is justly due to plaintiff, and that the late Mr. Siddell had borrowed it on the mortgage of these houses: this is fully proved by the depositions of witnesses adduced by him (plaintiff), and though defendant was called upon to adduce evidence to refute the same, yet he failed to do so.

" On the fourth, it appears to me that some time before defendant had purchased these houses, they were pledged to plaintiff by the late Mr. Siddell for money borrowed by him, which is the subject of this claim; hence he (defendant) as purchaser and successor of the rights and interests of the deceased in the houses in question, is justly liable for the money claimed, that is, so far as those rights and interests are concerned. Ordered, therefore, that a decree be given in plaintiff's favor for the sum claimed by him together with costs of suit, and further interest from the date of plaint to the date of realization of the money against the defendant, and on the property pledged, subject to the limitation referred to above."

The Court are unable to uphold the decision of the Principal Sudder Ameen. They cannot agree with him in considering that the defendant, by purchasing the property at public auction, thereby rendered himself liable for the debt on account of which it was pledged to the plaintiff. The Principal Sudder Ameen would seem to have been guided, in forming his conclusions, by

the ordinary practice of the Mofussil Courts in regard to sales in execution of decrees. But the present case is not one in which that practice can be maintained. The public sale of the property was brought about, under the authority of the Registrar of the Supreme Court, in his capacity of Administrator to the estate of a deceased British subject dying intestate, agreeably to the provisions of Section 6, Regulation XV. of 1806. The Judge had no discretion or option in the matter. He was bound to sell the property, and to remit the proceeds to the Registrar of the Supreme Court, to whom he very properly referred the plaintiff, when he applied to him for payment of his claim after the sale had been effected. To these instructions the plaintiff has not thought proper to conform; had he done so, doubtless his claim would have met with due attention from the Registrar. The suit brought by him against the defendant, the auction purchaser, is irregular. That individual is not in a position to dispute the plaintiff's claim. The mortgage bond may be liable to question, or it may have been satisfied, but the defendant may not have the means of proving this to be the case. The Registrar of the Supreme Court is the person who should have been impleaded by the plaintiff, as it was by his act that he considers himself aggrieved, and he, as the party having present possession of the estate of the deceased, is responsible for all just claims thereon. The plaintiff is not justified in resorting to a Civil suit until he has taken the usual steps to obtain his supposed rights by application to the party against whom he has a claim. He should, in common with the other creditors of the estate, have preferred his claim to the Registrar, and if dissatisfied with the result, he would then have been at liberty to seek redress by a Civil action against that Officer in a competent Court. The Court are disposed to regard the present case as somewhat analogous to that of an adjudication of insolvency in the Calcutta Insolvent Court, the effect of which, on the operations of the Mofussil Courts, is described by the Advocate General, in his opinion communicated generally to the Judges of the Zillah Courts by the Court's Circular Order of the 30th October 1837. It is therein stated, that "a mere decree made before the adjudication of insolvency will not authorize the complainant to seize the property of the insolvent, but that he must prove his debt in common with other creditors." The Advocate General was of opinion, "that all Courts, consequently those of the Mofussil, within the British Territories in the East Indies, are bound by the Act for the Relief of Insolvent Debtors; and that in a cause before them, the plaintiff must discontinue his suit if his claim is admitted on the Schedule of the insolvent, or disputed as to amount only." Unless some such rule were laid down, there might be simultaneous proceed-

ings, relative to the same matter, in two different Courts, recognizing no common superior, which would necessarily lead to unseemly collusion between the two authorities. The plaintiff in this suit asserts, that he objected to the sale before it was effected, and urged his lien on the property. He may have done so, but he has adduced no proof of the fact; and it is manifest, from his petitions to the Judge, under date 3rd and 22nd September 1847, presented after the sale, that he would have been perfectly satisfied if the Judge had paid him the amount of his mortgage money, which of course that Officer was not competent to do.

The sale appears to have been conducted with perfect regularity, and in the most public manner. The plaintiff's assertion, as to ignorance of the sale, is utterly unworthy of credit. No injury was done to the plaintiff by the sale: a suit brought by him for the recovery of the money advanced by him would have produced the same result. He would have applied for a sale of the property in execution of his decree.

For the above reasons, the Court, regarding the suit brought by the plaintiff against the defendant as irregular, and beyond the competency of the Mofussil Court to entertain and adjudicate upon, are pleased to reverse the decision of the Principal Sudder Ameen, and to dismiss the suit, with costs.

The 26th May, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASES NOS. 18 AND 19 OF 1850. { *Special appeals from the decision
of W. P. Masson, Esq., Offi-
ciating Judge of Goruckpore,
dated 29th August 1850.*

BHYROO DOOBE AND OTHERS, (*Defendants*), *Appellants,*
versus

JUGGUT BAHADOOR PAL AND NESUNDEE PAL, (*Plaintiffs*),
Respondents,

AND

BHYROO DOOBE AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

JUGGUT BAHADOOR PAL AND NESUNDEE BAHADOOR PAL,
(*Defendants*), *Respondents.*

THE particulars of these cases may be found among the printed decisions of the Zillah Courts for August 1850.

A special appeal was allowed in each case. In the first case, it was granted to "try whether the Judge has satisfactorily "refuted the arguments employed by the Principal Sudder "Ameen for his dismissal of the claim of the plaintiffs."

It was granted in the second case, "to try whether the Judge, in overruling the decision of the lower Court, should have dismissed the claim of the plaintiff as regards the third defendant, (Sukkut Bahadoor Pal), and whether he should have rejected the claim even against the two defendants who appealed, unless it were shown that the bond on which suit is brought is not genuine, the said two defendants being heirs of Humeer Pal, the writer of the bond."

It is beyond question, the Court observe, that the Judge's decision in the second case is erroneous, since Sukkut Bahadoor Pal, the third defendant in the suit, did not answer in the Court of first instance, and did not appeal to the Judge, and the action having been brought for money, a decree should have passed against him as a matter of course, unless special reason were assignable for taking his case out of the ordinary rule; and it is further obvious, that if Humeer Pal be proved to have granted a bond in payment of his debts, the property left by him at his decease, which passed by inheritance to his nephews, Juggut Bahadoor Pal and Nesundee Bahadoor Pal, is liable in satisfaction of that bond; but instead of dwelling further on the points raised in special appeal, the Court consider it a preferable course to remand both suits to the Judge's file, on account of the manifest inconsistency between the two decrees. The two cases are inextricably blended together, and one cannot be viewed apart from the other. It is admitted on all sides, that the *byenamah* and the bond, if executed at all, were executed at one and the same time, in the course of one and the same transaction; one of these documents, therefore, cannot be valid, the other invalid, yet, in his decision No. 6, the Judge has allowed the *byenamah* to be partially effective, and in his decision No. 7, he has thrown out the bond altogether. The Court forbear from the expression of any opinion on the merits of the two deeds, and they need scarcely remark, that the liability under the *byenamah* of Juggut Bahadoor Pal and Nesundee Bahadoor Pal is not, supposing the documents to be accepted by the Judge, inevitably co-extensive with their liability under the bond; all that the Court desire to lay down is this, that opposite opinions cannot be passed, as they have been passed, in respect to the intrinsic validity of the bond and the *byenamah*.

On these grounds, the Court remand both suits to the Judge's file, and direct that he pass a fresh decision in each case.

The 26th May, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 34 OF 1850. { Special appeal from the decision of Mr.
 J. Mercer, Principal Sudder Ameen
 of Furruckabad, dated 23rd September
 1850.

RAJAH JUGGUT SINGH, (*Plaintiff*), *Appellant*,

versus

ISHREE, (*Defendant*), *Respondent*.

IN this case, the plaintiff sued for enhancement of rent, and obtained a decree, though with some abatement of his claim, in the Court of the Moonsiff. The Principal Sudder Ameen dismissed the suit, and, eventually, it was remanded by the Sudder Court, in special appeal, to the Principal Sudder Ameen's file. The suit has been dismissed a second time, and a special appeal has been admitted "to try whether the decision of the Principal Sudder Ameen, rejecting the claim of the plaintiff to levy enhanced rent, is not founded on a wrong principle."

The Court are of opinion that, under the above certificate, the judgment of the Principal Sudder Ameen cannot be allowed to stand. The Moonsiff would appear to have gone fully into the case, and to have fixed the rates of rent payable by the defendant on recognized principles, and in conformity to facts duly ascertained. The Principal Sudder Ameen, while reversing the Moonsiff's decision, has done little more than consult the existing *jummabundee* of Settlement, and, being of opinion that the rates therein laid down are equitable, he has passed a decree accordingly; and he has fallen into the additional error of declaring that the rates are not alterable during the currency of the Settlement. The Principal Sudder Ameen is unmindful of the fact, that it is to establish a right to levy an enhanced rent on the existing *jummabundee* that this action is laid; and that the cognizance of this matter does not terminate with the enquiry instituted by the Collector at the Settlement, but is at all times vested in the Courts of law. Section 9, Regulation XXX. of 1803 declares, "if a dispute shall arise between the ryots or other under-tenants, and the persons from whom they may be entitled to demand *pottahs*, regarding the rate of the *pottahs* (whether the rent be payable in money or kind), it shall be determined in the Court of Adawlut of the Zillah in which the lands may be

situated, according to the rates established in the pergunnah for lands of the same description and quality as those respecting which the dispute may arise, or according to the legal and established rights of the parties, whether the same be ascertainable by written engagements or defined by the laws and regulations, or defined on general and local usage, which may be proved to have existed from time immemorial, this Regulation, not being meant to define or limit the actual right of any description of landholders or tenants, which can be properly ascertained and determined by judicial investigation;" and, further, Section 9, Clause 1, Regulation VII. of 1822, is as follows, "it being understood, and declared, that all decisions on the demands of the zemindars shall hereafter be regulated by the rates of rent and modes of payment avowed and ascertained at the Settlement, and recorded in the Collector's proceedings, until distinctly altered by mutual agreement or after full investigation in a regular suit." It was not open to the Principal Sudder Ameen to dispense with the "full investigation," above prescribed, and it was incumbent on him to show, before reversing the decree of the inferior Court, that the conclusion at which the Moonsiff had come, and on the strength of which he, to a certain extent, recognized the plaintiff's claim, cannot be borne out, that the facts are other than the Moonsiff has found them, or the arguments by which he supports his judgment fallacious.

The Court are constrained to remand the suit a second time to the Principal Sudder Ameen, in order, that he decide it anew with reference to the above remarks.

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The 26th May, 1851.

Present: { A. W. BEGBIE,
 { H. W. DEANE, } *Judges,*
 { S. S. BROWN, } *Offg. Judge.*

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CASE No. 65 OF 1851. { *Special appeal from the decision of C. Allen, Esq. Judge of Furruckabad, dated 18th December 1849.*

BOODHEEA, (*Plaintiff*), Appellant,
versus

BHOWANNEE PERSHAD AND OTHERS, (*Defendants*), Respondents.

THE particulars of this case will be found at pages 152 and 153 of the printed decisions for Furruckabad for the year 1849.

A special appeal was admitted to try, "whether the Collector was competent, under the circumstances of the case, as stated by the Principal Sudder Ameen and Judge, to remit the balance of rent claimed by the plaintiff."

The present appellant is the son of the original plaintiff Boodh Seya, by whom his title, to the amount sued for, has been made over to the appellant.

The Court are unanimously of opinion that this appeal must be rejected under the circumstances of the case, as set forth by the Principal Sudder Ameen and Judge: the Collector must be regarded as the representative of the proprietor of the estate, with full powers to act in such manner as might appear to him beneficial to the interests so entrusted to him. The proprietors appear to have been quite willing that the estate should be placed under the Collector's management, and it is unreasonable, as well as unjust, in any of them now to come forward and repudiate the Collector's acts. If the Collector was competent to grant a farming lease, he was also competent to remit such portion of the rent as appeared to him to be called for. The appeal is dismissed, with costs.

The 26th May, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

Case No. 132 of 1850. { *Special appeal from the decision of
Moulvee Mohamed Abdool Azeez
Khan, Principal Sudder Ameen of
Goruckpore, dated 30th October 1849.*

PRAG SINGH AND OTHERS, (Defendants), Appellants,
VERSUS

NONIDEH SINGH AND OTHERS, (Plaintiffs), Respondents.

THIS was a suit to obtain possession, as *birteeahs*, of a 5-anna 4-pie share of mouzahs Ugyawun Khutan and Dondopore. The Moonsiff of Deorya gave a decree in favor of the plaintiffs' claim, which was upheld in appeal by the Principal Sudder Ameen.

A special appeal was admitted to try, "whether the plaintiffs ought not to have been nonsuited by the Principal Sudder Ameen, on the plea urged by the appellants in his Court, viz. that the causes of action regarding each of the three villages

were distinct, and that, consequently, the claims to *all* ought not to have been included in one suit.

"Secondly, to determine, whether the plaintiffs, having neglected to prefer their claim to the Settlement Officer, when they had the opportunity of doing so, are entitled to institute a suit under the provisions of Section 23, Regulation VII. of 1822, to set aside the decision of the Revenue Authorities."

The Court are of opinion that the objection stated in the first point of the certificate of special appeal is fatal. It is quite clear that the *birt sunnuds*, upon which the plaintiffs base their claim to the shares in the respective villages, are two distinct documents, quite unconnected with each other, that for the share in mouzah Ugyawun, purporting to have been granted in 1206 Fuslee, and that for the shares in mouzahs Kutha and Daudupore, being dated in 1207 Fuslee. The Court cannot acquiesce in the validity of the plea urged by the respondents, that because their claims to engage were disallowed in one and the same date, they were, therefore, entitled to contest those decisions in a single suit. It appears that the Settlement Officer held separate proceedings in each of the three cases, and even allowing that a single suit in regard to mouzahs Kutha and Daudupore might not be irregular, in consequence of the *birt putr* for those two villages being one and the same, this concession cannot possibly be made in favor of the claim in mouzah Ugyawun, the *birt putr* for which is an entirely distinct document. The precedent* cited by the respondents' vakeel in support of his view is not applicable to the present case: the circumstances being quite different. The irregularity, in thus uniting in one suit two

* Ali Buksh, appellant,
versus
Oomeida Begum, respondent,
11th June 1850. S. D. A.,
R. N. W. P.

claims having no connection with each other, is so serious, that the Court are of opinion, that although the objection was not urged by the defendants in the Court of first instance, it was not the less necessary for the Principal Sudder Ameen to notice it, when urged in the petition of regular appeal. On the grounds above stated, the Court feel themselves compelled to nonsuit the plaintiffs; and it is therefore unnecessary to record any opinion on the second point in the certificate.



The 26th May, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 208 OF 1850. { Special appeal from the decision of
Tussuddooq Hoossein Khan, Prin-
cipal Sudder Ameen of Azimgurh,
dated 15th May 1850.

BABOO JYENATH SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

RAMJEEAWUN SINGH, (*Defendant*), *Respondent*.

THIS was a suit to recover Rs. 972-10, principal and interest, of a bond. Two other persons, besides the present appellant, were impleaded by the plaintiff, viz. Bhowannee Buksh Rai and Oodut Rai. The Sudder Ameen passed a decree in favor of the plaintiff against *all* the defendants, of whom Ramjeeawun alone appealed. The Principal Sudder Ameen, holding the bond not to be proved, reversed the Sudder Ameen's decision, and dismissed the claim as respected all three defendants.

A special appeal was admitted to try "whether, under the circumstances of the case, the Principal Sudder Ameen was justified in dismissing the plaintiffs' claim, as respects the defendants Bhowannee Buksh Rai, and Oodut Rai who did not defend the suit in the Sudder Ameen's Court, or prefer any appeal from that Officer's decision."

Previously to the Court's entering on the adjudication of the point specified in the certificate of special appeal, an objection was raised by the vakeel of the respondent to the proceedings of the appellant, which, he argued, were irregular, in that he had not made the two other defendants, Bhowannee Buksh Rai and Oodut Rai, (in regard to whom he sought an amendment of the Principal Sudder Ameen's decree), respondents.

The Court admit the validity of the respondent's objection, which they regard as fatal to the appeal, and a bar to any adjudication of the question, to try which the certificate of special appeal was granted. It is absolutely necessary, for the ends of justice, that the parties, whose interests are liable to be injuriously affected by the result of an appeal, should be made respondents in the Appellate Court. As a decree in an *original* suit may not be passed against a party not made a *defendant*, so a decree in *appeal* is barred against parties who have not been

constituted *respondents*: the Court are therefore under the necessity of rejecting this appeal, the costs of which will be paid by the appellant.

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The 26th May 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 226 OF 1850. { *Special appeal from the decision of*
 Tussuddooq Hoossein Khan, Principal
 Sudder Ameen of Azimgurh, dated
 5th June 1850.

SHEOUMBER RAI, (*Defendant*), *Appellant*,
versus

BUDLOO AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS was a suit to recover possession of one-seventh share of mouzah Beebupore, (the jumma being estimated at Rs. 30-11-5), by annulling a deed of sale executed in favor of the defendant, Sheoumber Rai, by Dookchore, defendant, who is the father of the plaintiffs. The plaintiffs stated that, on the 5th September 1847, their father, Dookchore, divided the estate between himself and his sons agreeably to the Hindoo law of inheritance, executing a *tugseemnamah*, or paper of partition, which was filed in the Revenue cutcherry. Having done this, Dookchore withdrew from worldly business, and became a *faqeer*, and the plaintiffs entered on possession of their respective shares. Shortly after, Dookchore became insane, of which state the defendant, Sheoumber Rai, taking advantage, got him to execute the *byenamah*, which forms the ground of the present suit, and caused the usual *dakhil kharij*, or mutation of names, to be effected in the *malgoozaree* register, the plaintiffs being prevented from offering effectual opposition to this proceeding in consequence of the absence of some, and the nonage of others, of their body. The plaintiffs also pleaded, that the execution of this deed of sale, by their father, was invalid, agreeably to Hindoo law, which prohibits a father from alienating his patrimonial estate when he has sons living. Moreover, as their father had divided his estates amongst his sons, the transfer to Sheoumber Rai was for this reason also of no effect.

The defendant, Sheoumber Rai, in reply, denied that Dookchore was, or even had been, insane. That person, he alleged, had

always managed his own affairs, and he and the plaintiffs lived together. Dookchore had borrowed Rs. 249-8 from defendant to meet the Government demand for revenue, and other necessary expences. Subsequently, with the view of defrauding defendant, Dookchore filed in the Collector's office a paper of partition of the estate amongst his sons, to which defendant objected, but unsuccessfully. Eventually, Dookchore and his sons (the plaintiffs) receiving Rs. 649-8 additional, executed by common consent the *byenamah* in question; and in 1847, made application for *dakhil kharij*, which, after various abortive attempts on their part to retract, was effected, and defendant has, from that time, been in possession.

The Moonsiff dismissed the plaintiffs' suit, being of opinion that the statement of the plaintiffs, relative to their father's insanity, was utterly false; that the *byenamah* was executed and *dakhil kharij* effected with the full consent of the plaintiffs; and that the present suit was suggested by the decision of the Sudder Court in the case of Mukoond Misser, under date 19th December 1846, but that, as in the present case, the assent of the sons was proved, that precedent was not applicable, and the alienation must be held to be valid.

In appeal, the Principal Sudder Ameen was of opinion that the consent of all the plaintiffs to the transfer had not been given, but the contrary; the only exception being in the case of the plaintiff Jubra, who, it appeared, had filed a petition in the Collector's Court, from which *his* consent was inferrible. With the deduction of the share of Jubra, therefore, the Principal Sudder Ameen passed a decree in favor of the plaintiff's claim.

A special appeal was admitted to try "1st, whether the decision of the Principal Sudder Ameen is not incomplete, in consequence of his having omitted to record his opinion relative to the alleged division and separate possession of their shares by the plaintiffs; 2ndly, whether the plaintiffs ought not to have been nonsuited, on account of the inconsistency in the statements contained in their petition of plaint."

The Court are of opinion that the plaintiffs have incurred the penalty of nonsuit, for the reason stated in the second paragraph of the certificate of special appeal. They assert, *first*, that their father Dookchore had, during his life-time, divided the patrimonial estate amongst his children. If this assertion were true, it is quite clear that Dookchore was incompetent, at a subsequent period, to execute a transfer of any portion of the estate; but the plaintiffs allege, *secondly*, that the sale to Sheoumber Rai was invalid, because, agreeably to the Hindoo law, a father may not, during the life-time of his sons, alienate any portion of the inheritance without their consent; and it is on the latter point only that

the lower Courts have recorded opinions, omitting to notice altogether the *first* and more important allegation of the plaintiffs, relative to the absolute renunciation of his right by Dookchore. Now, it is quite clear, that the two statements above noticed are inconsistent and incompatible with each other. If the *first* statement were true, the *second* objection to the sale, based on the peculiarity of the Hindoo law of inheritance, would be out of place. The *first* objection is grounded on the absolute disconnection of Dookchore from the estate; the *second* on his continued *joint possession*. Again, the statement, relative to their father's insanity, is inconsistent with their second statement, which presumes his being of sound mind when he executed the deed of sale. A plaintiff is not at liberty so to prove his plaint, as to leave it uncertain what constituted his cause of action. He is enjoined to state

precisely the matter of complaint.* On the present occasion, the plaintiffs do *not* state *precisely* the matter of complaint. They leave it doubtful whether they found their suit on the renunciation of his rights by Dookchore, on the Hindoo law of inheritance, or on the fact of Dookchore's insanity, when the *byenamah* was executed.

The decision of the Principal Sudder Ameen is reversed, and the plaintiffs are nonsuited, with costs.



The 26th May, 1851.

Present : { A. W. BEGHE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

CASE No. 237 OF 1850. { Special appeal from the decision of
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 19th July 1850.

SUDASOOKH, (Plaintiff), Appellant,
versus

RAM DIAL AND CHYNSOOKH, (Defendants), Respondents.

THIS case will be found reported at pages 94 and 95 of the printed decisions for Zillah Meerut for the year 1850.

A special appeal was granted to try "whether the Officiating Judge ought not to have upheld the decree of the Sudder Ameen with respect to Ram Dial, defendant, who confessed judgment, and Chynsookh, defendant, who did not appeal from the Sudder Ameen's decision."

The respondents, Ram Dial and Chynsookh, have not appeared in this Court to defend the appeal, but Mussumat Kesur and Gunga Buksh (two other defendants in the original suit, who were not made respondents by the appellants) have spontaneously made appearance, with the view of defending the appeal.

Previously to entering upon the adjudication of the point specified in the certificate of special appeal, it was necessary for the Court to determine, whether the defendants, Mussumat Kesur and Gunga Buksh, not having been made respondents by the appellant, are at liberty to appear, as such, of their own accord. The Court are of opinion that this question must be answered in the negative. The decree of the Principal Sudder Ameen cannot, under the terms of the certificate, be so altered as to affect, injuriously, *their* interests. There is, therefore, no *necessity* for their appearing to defend the appeal; and no violation of the principles of justice in declining to hear them in support of the Principal Sudder Ameen's decision.

With respect to the question mooted in the certificate of special appeal, it has been repeatedly held in this Court that, as a *general* rule, decrees for *money* should pass against such of the defendants as confess judgment, or acquiesce in the decision passed against them; acquiescence being inferred from their omission to appeal: and the only deviation allowed from this rule is, where there is reason to apprehend that, by allowing the decree against confessing, or acquiescent defendants to stand, the interests of the other defendants, who have successfully resisted the claim, may suffer. It is a matter of little importance if the confessing, or acquiescent, defendants continue to be held responsible. Frequently such defendants are in collusion with the plaintiffs; and if they fall into the snare they have set for others, they are justly punished. In the present case, no special reason is shewn why the Sudder Ameen's decree should *not* have effect against the respondents, and the decision of the Officiating Judge, so far as it absolves them, is accordingly reversed. The respondents will be charged with the costs of this appeal.



The 26th May, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 85 OF 1851. { Special appeal from the decision of
 Moulvee Mohamed Ruzzee-ooddeen
 Khan, Principal Sudder Ameen of
 Allypore, dated 23rd September 1850.

JAHAN KHAN, (*Defendant*), *Appellant*,

versus

KHAJEH ALI KHAN AND BULUND KHAN, (*Plaintiffs*), *Respondents*.

THIS was a suit to obtain possession of quarter of mouzah Churra, by redemption of a mortgage, the jumma being estimated at Rs. 565-8.

Plaintiffs stated that there were four *puttees* in mouzah Churra, viz. quarter belonging to themselves, quarter to defendants, quarter to Izzut Khan, and quarter to Asolut Khan and others. In 1240 Fuslee, in consequence of a balance of Rs. 403-13 becoming due from plaintiffs, their *puttee* was made over to the defendant for five years, i. e. from 1241 to 1245 Fuslee, on condition that, after the expiration of that period, plaintiffs, on making good the arrear, (which had been paid by the defendant), should be reinstated in their *puttee*. In 1246, not being in a condition to redeem the *puttee*, plaintiffs borrowed Rs. 596-3 from the defendants, executing a deed of mortgage in favor of the latter to the amount of Rs. 1,000, for the term of ten years, i. e. from 1247 to 1256 Fuslee, and the defendant had, up to the period of instituting the suit, retained possession, and although the term of the mortgage has expired, the defendant refuses to surrender possession.

The defendant admitted that the plaintiff's *puttee* had been made over to him in the manner stated by the plaintiffs, viz. on account of balances; but he alleged that, when a new Settlement was made in 1246, in consequence of the plaintiffs not being able to repay the balance which had been liquidated by the defendant, the Settlement had been *renewed* with him (defendant) as *farmer* of plaintiffs' *puttee*, for the term of twenty years, viz. from 1246 to 1265 Fuslee, and that plaintiffs, having borrowed from them Rs. 596-3, in addition to the Rs. 403-13, (the amount of the balance advanced by the defendant), executed a mortgage of their *puttee* for Rs. 1,000 in his favor, but that he remained in possession of the *puttees*, not as *mortgagee*, but as *Government*

farmer, under the Act of Settlement. That, consequently, plaintiffs had no right to sue to recover possession by redemption of the mortgage, but must first obtain a decree to set aside the Settlement made with the defendant. The defendant also alleged that, in addition to the debts above specified, the plaintiffs had borrowed from him a further sum of Rs. 1,000, and executed a second mortgage bond, binding themselves not to prefer any claim to redemption within the period of the last Settlement, and that, consequently, this suit is opposed both to plaintiffs' own agreement and the order of the Settlement Officer.

The Sudder Ameen decreed in favor of the plaintiffs, observing that, it was clear from the defendant's own *urzee*, under date 19th August 1846, that he was in possession, not as *farmer*, but as *mortgagee*; that the Settlement *roobakaree*, dated 30th September 1838, on which the defendant relied, did not benefit his case, it being many years antecedent to the petition above-mentioned; that it was evident from the order under date 21st August 1846, passed on the defendant's petition, that the Collector was not satisfied with the Settlement proceeding of the 30th September 1838, and that the second mortgage deed, filed by the defendant, was a palpable forgery. The Sudder Ameen accordingly ordered, that the plaintiffs should be reinstated in possession of their *puttee*, on payment of Rs. 1,000, which was all that was shewn to be due from them.

In appeal, the Principal Sudder Ameen confirmed the Sudder Ameen's decree.

A special appeal was admitted "to determine, whether the Sudder Ameen and Principal Sudder Ameen were legally competent to set aside the farming Settlement made with the petitioner, and to give plaintiffs a decree for possession."

The Court are of opinion that the Sudder Ameen and Principal Sudder Ameen, in decreeing immediate possession of their *puttee* to the plaintiffs, have exceeded their legal authority. On referring to the Settlement *roobakaree* of the 30th September 1838, it is quite clear that the *puttee* of the plaintiffs was given *in farm* to the defendant for the period of twenty years, viz. from 1246 to 1265 *Fuslee*, and the Civil Courts have no authority to set aside a farming arrangement made by the Revenue Authorities, which, in passing a decree in favor of plaintiffs, the lower Courts have done. The petition presented by the defendant to the Collector on the 19th August 1846, and the order passed thereon by the Collector, do not affect the main question. The plaintiffs had attempted, by a false representation to the Collector, by concealing the circumstance of the mortgage for Rs. 596-3, (which is now admitted by both parties), to recover possession of their *puttee*, by payment, merely, of the balance of Rs. 403-13,

on account of which it had been transferred to the defendant; and the object of the defendant, in presenting his petition of the 19th August, was to expose this attempt at deception, rather than to vindicate his right to maintain possession, as *farmer*, under the Settlement. It is also not improbable that he expected to make a more successful resistance to the plaintiffs' claim, by putting the matter of the mortgage in a clear light, than by insisting on his other equally legal title as *farmer*. Be this as it may, the fact is indisputable, that a farming Settlement of the plaintiffs' *puttee* was made with the defendant, and that no objection even was made thereto at the time, by the plaintiffs, although they were present when the arrangement was made.

The decisions of the Sudder Ameen and Principal Sudder Ameen are accordingly reversed, and the suit of the plaintiffs dismissed, with costs.

The 27th May, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 240 OF 1850. { *Special appeal from the decision of*
G. F. Harvey, Esq., Judge of Caw-
pore, dated 17th August 1850.

BUTTUN AND LALLA, (*Plaintiffs*), *Appellants,*
versus

LUCHMUN, *tewarree*, (*Defendant*), *Respondent.*

THIS case is given among the printed decisions of the Zillah Courts for August 1850.

A special appeal was allowed to try, "whether the order of the Judge, dismissing the plaintiffs' claim to interest, should be sustained, particularly with reference to the precedent of a full Court, cited by the special appellant, dated 18th June 1846, Luchmee Narain Singh, plaintiff, appellant, *versus* Sahib Zadeh defendant, respondent.

The Court find the precedent cited by the special appellant to be so far not strictly parallel with this case that the precedent has reference to the interest due on a principal sum secured by bond, whereas the present claim is brought to recover interest due on the balance of a cash account. But, according to established custom on which the written law in regard to interest is declaredly founded, debts of this latter description

are, as well as bond debts, recoverable, with interest, unless, on valid reasons to be assigned in each case, the Courts shall see fit to disallow the interest. If no valid reasons are put forward, there is legitimate ground of special appeal. In the case before the Court, the reasons assigned by the Judge for refusing interest to the plaintiff are as follows. "It is not shown by plaintiff that the defendant succeeded to any property after his father's death; if he had done so, it would be a reason the more why settlement of all claims against Koonjee, *tewarree*, should have been made at the date of that occurrence, looking to the liability of sons under the Hindoo law, to discharge the debts of their father; and as it has not been shown on part of defendant, that assets were wanting, I amend so much of the Sudder Ameen's decree as awards interest, and decree the principal only, Rs. 171-6-9. As a money-lender, the plaintiff should have kept a more complete set of books; he should have adjusted the claim on the death of the original debtor; he should, under the asserted admission by the son, ten years ago, have protected himself by a bond; also, he should have brought his claim sooner." With respect to the last reason urged by the Judge, it has been authoritatively declared to be not

* Sudder Dewanny Adawlut, Select Report, 7th August 1820. Vol. 3, Page 48.

sufficient;* and with respect to the other reasons which he has assigned, so far from being cogent, they are not even relevant.

The Court, therefore, in alteration of the decree passed by the Zillah Judge, declared the plaintiffs entitled to the interest they have sued for.

The 29th May, 1851.

Present: A. W. BGGIE, Judge.

CASE NO. 157 OF 1850. { *Regular appeal from the decision of Mohumed Kurreem-oollah Khan, Principal Sudder Ameen of Agra, dated 5th July 1850.*

ANUND LALL, (*Defendant*), *Appellant*,

versus

MADHO LALL AND KISHEN LALL, (*Plaintiffs*), *Respondents*.

THIS WAS a suit to recover possession of half of mouzah Nougaoan, a *maaffee* village, and of a house and garden, with *wasilat*; also, to procure execution of a decree obtained by Mussumat Choonnoo: the total claim being estimated at Rs.

31,009-7-8½. The substance of the plaintiffs' claim is as follows. Bintee Ram, from whom plaintiffs claim inheritance, had two wives, viz. Mussumat Choonnoo and Mussumat Ato: by the former, Bintee Ram left no issue, but by Mussumat Ato, he had a daughter, Mussumat Sooruj Konwur, the mother of the plaintiffs. The property in dispute had been acquired by Bintee Ram, who, however, associated with himself his brother Bishun Lall. Bintee Ram died, whereupon Bishun Lall dispossessed the widow, Mussumat Choonnoo, of the half of the estate, which had come into her possession, on her husband's death. The widow vindicated her rights by a suit in Court, and obtained decrees from the Provincial and Sudder Courts, in 1814 and 1815, to the effect, that she should continue in possession during her life-time, and that on her demise, the estate should devolve on the *heirs of Bintee Ram*. Mussumat Choonnoo obtained possession in conformity with the above decree, and, having no child of her own, she caused the name of her stepson, the plaintiff, Madho Lall, to be entered in the *kheewat* paper, and constituted him her manager. Mussumat Choonnoo died in 1846, having, previously, (in 1840) obtained another decree against Suda Ram and others, cultivators of the village, for rent due. Plaintiffs applied to the Zillah Judge for a certificate of heirship, under Act XX. of 1841, and obtained it; but, in appeal, this order was reversed by the Sudder Court, and a certificate granted to the defendant Anund Lall, by virtue of which the latter dispossessed the plaintiffs of their half of the estate, and also collected the rents for 1255 and 1256.

The defendant, Anund Lall, in his reply, urged several objections to the suit on points of form and procedure, which, he said, subjected the plaintiffs to the penalties of a nonsuit, and in regard to the merits of the case, he contradicted the plaintiffs in every material point, asserting that Bintee Ram had no issue by *either* wife, that, consequently, the plaintiffs were not the descendants or representatives of Bintee Ram, but that he, (Anund Lall), was the legal heir, being the son of Bishun Lall, the brother of Bintee Ram. He took exception also to the calculation of the *mesne* proceeds contained in the petition of plaint. The remaining defendants filed a reply of a similar tenor.

The Principal Sudder Ameen's decision is in substance as follows. That there were four points for consideration. 1st. Are the plaintiffs the grandsons of Bintee Ram, or not? and, if so, have they a preferential claim, as heirs, over the defendant Anund Lall, the nephew of Bintee Ram. 2nd. Did plaintiffs (as alleged by them) obtain possession as *heirs* on the death of

Mussumat Choonnoo, and were they subsequently dispossessed by the defendant Anund Lall, or did they never obtain possession at all? 3rd. How far do the contradictions, apparent in the statements of the plaintiffs, as to the foundation of the claim, affect the claim itself? 4th. Is the amount of *mesne* profits declared by the plaintiffs, proved or not? In regard to the first point, the Principal Sudder Ameen decided that the fact of the plaintiffs being the grandsons of Bintee Ram is established, for the following reasons. Eight witnesses depose to that effect; the plaintiff Madho Lall is entered in the Statement No. 7 of the Collector's office in 1254 Fuslee, as the *heir and grandson* of the deceased maffeedar; in the *roobakaree* of the Magistrate of Muttra, under date 18th January 1847, the defendant, Anund Lall, is represented as designating Madho Lall, as the *grandson*: that it appears that an *urzee* of Anund Lall, defendant, in the Magistrate's office, had been designedly blotted, with the purpose of rendering illegible the word *newasa*. Bishun Dass, the father of Anund Lall, defendant, in his deposition of the 22nd November 1832, had denominated Madho Lall his *co-sharer* in the estate; and the inspection of several other documents, bearing date from 1831 to 1845, shewed, that Bishun Dass and the defendant, Suda Ram, had then admitted the title and possession of the plaintiffs. Under these circumstances, no doubt can remain that plaintiffs are the grandsons of Bintee Ram. On the second point, the Principal Sudder Ameen decided that plaintiffs had obtained possession on the death of Choonnoo, as appears from various documents filed by them. On the third point, the Principal Sudder Ameen observed, that admitting the discrepancies charged against the respondents, Madho Lall, in his designation of himself on various occasions during the life-time of Mussumat Choonnoo, yet no importance was to be attached to the circumstance, as, at that time, he advanced no claim to the property, and may indiscriminately have styled himself "adopted son" or *karindah*: there is no such positive contradictions in the appellations, as to constitute a bar to the plaintiffs' present claim. The Principal Sudder Ameen remarked that the Collector's *roobakaree* of the 26th January 1830, (in which the right of the brothers and nephews of Bintee Ram to succeed, on the death of Mussumat Choonnoo, was recognized), could have no force, *judicially*, as it was not within the Collector's province to determine who were the *heirs* of Bintee Ram; that in the copy of the petition of the plaintiffs, under date 18th March 1847, filed by defendants, the plaintiffs prefer their claim to the succession, both as the *grandsons* of Bintee Ram and the *donees* of Mussumat Choonnoo;

that the statement of the defendant Anund Lall's witnesses, that plaintiffs were the sons, not of Mussumat Ato, but of Mussumat Jhoonnoo, (a sister of Mussumat Choonnoo), is entitled to no credit, as no mention of the fact is made in that defendant's *jawabdawee*; that, in short, he is satisfied that plaintiffs are the grandsons of Bintee Ram, and are, as such, agreeably to the decree of the Sudder Court, and the Hindoo law of inheritance, as declared by the pundit of the Sudder Court, entitled to succeed, in preference to the defendant, Anund Lall, who is only the collateral relative, viz., (a nephew) of Bintee Ram. Regarding the claim to *wasilat*, the Principal Sudder Ameen decreed for no more than Rs. 2,335-1, being Rs. 1,126-10-8½ less than the amount claimed, under this head, by the plaintiffs. The Principal Sudder Ameen also dismissed that part of the plaintiffs' claim which related to the execution of the decree obtained by Mussumat Choonnoo, which he considered to constitute a separate cause of action, quite unconnected with the inheritance from Bintee Ram. The decree was to have effect against the defendant Anund Lall *only*, the other defendants being absolved, as they had been made defendants *pro forma*, and had no interest in the matter.

From this decision both parties appealed. The present decision has reference to the appeal of the defendant Anund Lall. The defendants Suda Ram and others did not appeal.

The only fault I have to find with the decree as it affects the defendant, Anund Lall, is the omission of the Principal Sudder Ameen to charge to the plaintiffs, with the costs, on the proportion of their claim which has been dismissed, a deduction which, however small, the defendant has a title to demand. I entirely concur with the Principal Sudder Ameen in the view taken of the *merits* of the case. There can be no doubt, on a perusal of the evidence, that the plaintiffs are the grandsons of Bintee Ram, and that, as such, they are entitled to succeed to his property. It is true that the plaintiffs did formerly claim to succeed as the *donees* of Mussumat Choonnoo. They, probably, were not then aware of their own *hereditary* rights; but this mistake cannot operate as a bar to their succession, now that they have preferred their claim by right of descent. The plaintiffs' vakeel having intimated his willingness to acquiesce in the slight modification of the Principal Sudder Ameen's decree proposed by the Court, it is unnecessary to refer the case to a full bench, and the Principal Sudder Ameen's decision is modified accordingly.



The 29th May, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 210 OF 1850. { *Regular appeal from the decision of
Mohumed Kurreem-oollah Khan,
Principal Sudder Ameen of Agra,
dated 5th July 1850.*

MADHO LALL AND KISHEN LALL, (*Plaintiffs*), *Appellants*,
versus

ANUND LALL, (*Defendant*), *Respondent*.

THIS is a cross appeal connected with the case No. 157, in which Anund Lall, defendant, is appellant, *versus* Madho Lall and Kishen Lall, respondents. The plaintiffs were dissatisfied with that part of the Principal Sudder Ameen's decision which dismissed their claim to take out execution of the decree obtained by Mussumat Choonnoo, and a portion of their claim to *wasilat*.

With reference to the opinion recorded by me in the appeal of Anund Lall, defendant, seeing no reason further to modify the decision of the Principal Sudder Ameen, I dismiss this appeal, with costs.

The 31st May, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 102 OF 1851. { *Special appeal from the decision of J. P.
Gubbins, Esq., Judge of Dehlie, dated
19th February 1851.*

AJOODHREA PERSHAD, (*Defendant*), *Appellant*,
versus

JEEWUN BUKSH, (*Plaintiff*), *Respondent*.

THIS case will be found reported at page 88 of the printed decisions for zillah Dehlie for the month of February last.

A special appeal was admitted to try, "whether the Judge's decision be not open to the objection of incompleteness, inasmuch as he has omitted to record any opinion on a material point urged by the plaintiff as the cause of action, but which had been declared not proved by the Court of first instance."

The Court observe that the plaintiff in his plaint has stated that, in 1846, Ramjee Dass, the brother of defendant, (the former

proprietor of the house now occupied by defendant) had opened the door in question, whereupon Sheik Mendoo, (brother of plaintiff), complained in the Foujdaree Court, and agreeably to the decision of a *punchayet*, Ramjee Dass closed the door, and, on the 29th March 1846, executed an *ikrarnamah* to the purport that it should not be reopened; that the said house having since passed into the possession of the defendant the latter, on the 29th May 1850, reopened the door, on which plaintiff, who now occupies his brother's shop, again complained in the Magistrate's Court, and was referred to the Civil Court. Plaintiff sued accordingly, as the door could only be approached by passing over his ground: the Moonsiff decided that the plaintiff's statement, relative to the former closing of the door in conformity with the award of the *punchayet*, and the execution of the agreement by Ramjee Dass not to reopen it, were not proved and he, also, stated his opinion, that no injury accrued to the plaintiff from the opening of the door. He accordingly dismissed the plaintiff's suit. The Judge in his decision has taken no notice whatever of the plaintiff's statement regarding the alleged *punchayet* and *ikrarnamah* of Ramjee Dass, but confines himself to the fact of the *hurj* or nuisance complained of by the plaintiff, which, in opposition to the opinion of the Moonsiff, he considers to be established, and has, also, found an *additional* nuisance, not complained of by the plaintiff, viz. that defendant has "picketed a bullock in the place to which it (the door) leads." It is hardly necessary to repeat here, (what has been often pointed out by this Court), that the Civil Courts should strictly confine themselves to the adjudication of the point or points at issue between the parties, *as set forth by themselves*. This rule has clearly been violated by the Judge in the present instance. He has *not* given an opinion on the case as stated by the parties themselves, and his decision is necessarily vitiated thereby, and must be amended. I accordingly reverse his order, and remand the case to be retried with advertence to the foregoing observations.



The 31st May 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 16 OF 1849. { *Regular appeal from the decision of
Khadim Hoossein Khan, Principal
Sudder Ameen of Cawnpore, dated
8th September 1848.*

MR. S. R. GREENWAY AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

RUNMUST KHAN AND OTHERS, (*Defendants*), *Respondents*.

THIS is a suit to recover Rs. 5,442-12-4 $\frac{1}{2}$, principal and interest, due on certain vouchers and accounts. The Principal Sudder Ameen gave a decree in favor of the plaintiffs to the amount of Rs. 2,399-13-6 $\frac{1}{2}$, and dismissed the residue of the claim; a decision with which both parties, being dissatisfied, a double appeal was preferred to this Court under dates 26th January and 12th February 1849: owing to the death of the appellant's vakeel, and the absence on leave of the respondent's vakeel, delay unavoidably occurred in bringing the case to a hearing. The record was called for on the 21st November 1850, and another vakeel having been appointed by the appellant, the case was called on, when the pleaders on both sides requested that it might be allowed to lie over, as an amicable adjustment was in progress. On the 17th instant, accordingly, *soolehnamahs* were filed by both parties, of which the following is the purport. The defendants agree to pay to the plaintiffs Rs. 4,361-11-4 $\frac{1}{2}$, principal, and interest at the rate of 12 per cent. per annum, from the date of the *soolehnamahs*, within the period of four years, the estates of Ramsaree, &c., which are already pledged to the plaintiffs to continue so, until the stipulated payment be completed: in the event of any default on the part of the defendants, the plaintiffs to be at liberty to bring to public sale the estates above-mentioned, without let or hindrance from the defendants. In the event of the present incumbents of the estates, (Mussumat Peerun and Fuzul Hoossein), allowing the Government revenue, in any year, to fall in balance, and the estates, in consequence, being advertized for sale, plaintiffs to have the privilege of paying up the said balance, and to cause the public sale of the estates, in anticipation of the expiration of the period fixed for the payment to the plaintiffs. The plaintiffs further agree to forego all claim to interest, antecedent to the date of the *soolehnamahs*; and both parties are to pay their own costs, in both Courts. The defendants are to pay the interest stipulated year

by year, and in default thereof, the plaintiffs shall be at liberty to sue out execution for the whole amount due to them, with interest, and to bring to auction sale the aforesaid mouzahs in satisfaction of their claim.

In conformity with the foregoing *soolehnamahs*, the decree of the Principal Sudder Ameen is modified, and a decree passed in favor of the (plaintiffs) appellants for the amount, and with the conditions recited in the *soolehnamahs*. The defendants withdraw their appeal, and will be entitled to the refund of the value of the stamp duty on their petition of appeal.

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The 31st May, 1851.

PRESENT: { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

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CASE No. 201 OF 1849. { Regular appeal from the decision of
Moulvee Mohamed Hussun Khan,
Principal Sudder Ameen of Myn-
poorie, dated 28th July 1849.

Koonwur Ajeet Singh and Rajah Cheyt Singh, (*Defendants*),
Appellants,
versus

Mirza Ahmed Beg, (*Plaintiff*), *Respondent*.

THIS was a suit to recover Rs. 23,351-15-10, principal and interest, being a balance due on a deed of *kutkinnah*. The plaintiff's statement is to the following effect. That the defendant, Rajah Cheyt Singh, gave in *theeka*, to Mirza Qasim Ali Beg, the deceased son of plaintiff, for the term of eight years, viz., from 1248 to 1255 Fuslee, at an annual jumma of Rs. 2,500, the three villages of Kurree, Gureebpore, and Kirpalpore, on the condition that the Rajah should pay the Government jumma, and that the theekadar should pay the annual rent, stipulated in the deed of *theeka*, to Mirza Mohamed Syed, (a creditor and mortgagee of the Rajah's), to the amount of Rs. 20,000, and that Mohamed Syed's receipts should be made over to the Rajah. The deed of *theeka* was executed on the 19th July 1840, and, on the same date, the theekadar, Qasim Ali, executed a deed of *kutkinnah* of these same villages, in favor of Koonwur Ajeet Singh, defendant, (the Rajah's brother), for the same amount and period as are specified in the *theeka* itself, and the Rajah executed a security bond on behalf of his brother, the kutkinnahdar, bind-

ing himself to make good any default on his brother's part, and pledging the talooqua of Purbabneer as a security for the fulfilment of his own engagement: all these three deeds were duly registered. The kutkinnahdar has, however, paid only Rs. 3,346 out of the Rs. 20,000 due from him to the theekadar. That sum has, in conformity with the agreement, been paid to the mortgagee, and the receipts of the latter made over to the Rajah: as plaintiff's son had engaged to pay the entire amount of the *theeka* to the mortgagee, the latter had pressed the plaintiff for payment, and had got possession of a large portion of his property in satisfaction of his claim, in consequence of which plaintiff, for his own protection, was compelled to bring this action.

The defendant, Rajah Cheyt Singh, in reply, stated, that he had entered into negotiation with Mirza Mohamed Syed, with a view to obtaining a loan from that person of Rs. 20,000 to be repaid, in eight years, by annual instalments of Rs. 2,500, mortgaging to the lender seven villages in talooqua Beena, with power to foreclose the mortgage on default of payment, the mortgage deed bearing date 19th July 1840: that at the desire of the mortgagee, the *theeku*, &c., were executed, as a means of providing for the payment of the debt. It was agreed that the deeds should *first* be registered, and the money paid *afterwards*, on receipt of which the deeds were to be made over to the mortgagee; the registry was effected accordingly, and defendants' *mookhtear* applied for the money. The mortgagee advanced, at different times, only Rs. 8,000, and got the deeds from the defendants' *mookhtear*, promising to pay the balance of the loan, after deducting the portion reserved in payment of interest *in advance*. The mortgagee, however, never paid any portion of the balance to defendant, and, on being pressed for payment, said he would have nothing to do with the mortgage, *theeka*, &c., and called on defendant to refund the Rs. 8,000 already paid to him, and to take back the papers. Defendants' *mookhtear* objected that he was unable to do so *immediately*, having paid away the Rs. 8,000 in revenue and other necessary expenses, but would do so by *degrees*; and Rs. 4,513 were so repaid in money and kind. The defendant pleaded, that the *theeka* and *kutkinnah* transactions are *nominal* transactions, as is evident from the identity of dates, periods, and sums entered in the several deeds; that the plaintiff's son, Qasim Ali, was a relative of Mirza Mohamed Syed, the mortgagee, and never obtained possession, as theekadar; that the mortgagee was in fact the only party interested; that the plaintiff had not himself made good any portion of the amount of the *theeka*, and had, therefore, no right to institute this suit; that, as the conditions of

the original mortgage had not been fulfilled, the *theeka* and *kutkinnah* transactions, which were dependent thereon, had no existence, and that the mortgagee would have been *alone* entitled to appear, as plaintiff, had he kept faith with defendant in the matter of the loan and mortgage.

The other defendant, Koonwur Ajeet Singh, filed a reply of a similar tenor, with the additional plea, that he had never obtained possession as *kutkinnahdar*.

The Principal Sudder Ameen decreed in favor of the plaintiff's claim, holding the *theeka* and *kutkinnah* transactions to be valid. He considered the payment of the Rs. 20,000, on the part of the mortgagee, satisfactorily proved. He observed, that the defendant was able to adduce no proof of his assertion, that the *theeka* and *kutkinnah* transactions were incomplete and invalid; that he had not got back the papers; that the payment of his instalments to Qasim Ali, the theekadar, under the *kutkinnah*, was proved; that the plaintiff was fully competent to sue, as the heir of his son, the theekadar; that the mortgagee, Mirza Mohamed Syed, was not in a position to sue, in consequence of the subsidiary arrangements made for the satisfaction of his mortgage; and that the accounts produced by the defendants, to establish the payment of Rs. 1,167, in excess of the sum admitted to have been received by the plaintiff, were unworthy of credit. In conclusion, the Principal Sudder Ameen, to guard against a possible fraud on the part of the mortgagee, Mohamed Syed, by subsequently instituting a suit in his own name, on the mortgage deed, after the passing of the present decree, ordered, that the amount of this decree should be paid to the plaintiff, only on the condition of his producing the receipt of the mortgagee, and likewise the mortgage deeds, for the purpose of the same being returned to the defendant Rajah Cheyt Singh.

The defendants being dissatisfied with this decision, appealed therefrom, and the case came to a hearing, this day, before a full Court.

The Court are unanimous in opinion that the decision of the Principal Sudder Ameen cannot be maintained. It is quite clear to them that this is not a *bond fide* suit on the part of the plaintiff, but that the *real*, though not ostensible, suitor is Mirza Mohamed Syed, the mortgagee. This fact is clear, as urged by the defendants, from the identity of the dates of the mortgage and other deeds, of the sums specified therein, and of the periods fixed for payment in each. The Principal Sudder Ameen seems to have been perfectly aware of this fact, and in order to avoid any bad use being made of the present decree, he has attached a condition to it, which he was not competent to do. He has, in fact, decided on the matter of the *mortgage*, which was not judi-

cially before him. Being satisfied of the inseparable nature of the several transactions, he should, at once, have dismissed the plaintiff's claim. The whole arrangement of the *theeka* and *kutkinnah* was a mere contrivance on the part of Mohumed Syed to obtain a double security for the loan advanced by him to the Rajah. It is absurd to suppose that there could be any reality in the Rajah's giving the villages in *theeka* to the plaintiff's son, the latter reletting the same to the Rajah's brother, for whom the Rajah was to become security. The plaintiff, as the representative of his son, would have no right to sue as theekadar, even had the transaction been a *real* one: a *theeka* or other farming tenure is not *hereditary*. The liability under that deed expired with Qasim Ali. The Court give no credit to the plaintiff's assertion, that Mohumed Syed had held him responsible for the non-fulfilment of his son's engagements, and even supposing that plaintiff had complied with the mortgagee's demand, his inconsiderate acknowledgment of an illegal claim would not invest him with the right to sue the kutkinnadar and his security.

With advertence to the foregoing observations, the Court reverse the decision of the Principal Sudder Ameen, and dismiss the plaintiff's suit, with costs.

The 31st May, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 84 OF 1851. { Special appeal from the decision of
 C. Allen, Esq., Judge of Furruck-
 abad, dated 20th August 1850.

SYED WAZEEER ALI, (Plaintiff), Appellant,

versus

HIMUNCHUL AND OTHERS, (Defendants), Respondents.

FOR the particulars of this case see pages 153 and 154 of the printed decisions for Zillah Furruckabad, for the past year.

A special appeal was admitted to try, "whether the Principal Sudder Ameen and Judge was justified, under their own finding of the points at issue between the parties, in dismissing half of the plaintiff's claim, and whether they ought not, on the contrary to have given him a decree for the *whole*."

The case came to a hearing before a full bench this day, the respondents not appearing to defend the appeal.

The Court find the fact undisputed by the respondents that they are in possession of $\frac{5}{8}$ ths of the village, which the plaintiff had advertized for sale in execution of his decree against Moolloo, *alias* Khoondun, whom he declares to be the father of respondents, and to whom the property had been transferred by Moolloo. The defendants reply that Moolloo and Khoondun are distinct persons, that the latter is their father, and that they have derived no part of their present possession from Moolloo, against whom plaintiff held the decree; and that, consequently, they were not liable for that decree. The only point then at issue between the parties is, are defendants the sons of Moolloo, *alias* Khoondun, or of *Khoondun*, a distinct individual. The Principal Sudder Ameen and Judge have found that Moolloo and Khoondun are one and the same, and that defendants are his sons, their defence therefore falls to the ground, and the whole $\frac{5}{8}$ ths must be held liable for the decree against Moolloo, *alias* Khoondun. The reasons assigned by the Judge and Principal Sudder Ameen for exempting half the property from sale are wholly insufficient: the Principal Sudder Ameen *supposes* what is not even asserted by the respondents, that they had derived $2\frac{1}{2}$ biswahs from one Bejey; an assumption quite unwarranted by the record, and in direct opposition to Bejey's own evidence in the case. The Principal Sudder Ameen and Judge should bear in mind the salutary rule laid down in the Circular Order of the 18th September 1843, viz., that Judicial Officers should "strictly confine themselves to the adjudication of the point or points at issue between the parties, as set forth by themselves."

The Court amend the decision of the lower Courts, and decree *in full* the claim of the appellant, with all costs of suit.

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The 31st May, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 • { S. S. BROWN, } Offg. Judge.

CASE NO. 97 OF 1851. { Special appeal from the decision of
 Tussuddooq Hoossein Khan, Principal
 Sudder Ameen of Azimgurh, dated
 31st May 1850.

HAJEE IMAM BUKSH, (*Plaintiff*), *Appellant*,

versus

SHEO GHOLAM AND SHEO PULTUN, (*Defendants*), *Respondents*.

THE plaint in this case sets forth that a loan was advanced to defendants on security of a lease, which was afterwards con-

verted into a deed of sale of the property, and that the purchase money included a balance in the former loan of Rs. 199 remaining due at the time of the execution of the deed. A suit was afterwards brought by plaintiffs to establish their deed of purchase, in which they were cast, and they now sue to recover the Rs. 199, with interest, the balance due on the loan.

The Sudder Ameen was of opinion that the suit was barred by the provisions of Section 10, Regulation II. of 1803, and considering it a vexatious one, he imposed a fine on plaintiff of Rs. 100. In appeal, the Principal Sudder Ameen differed from the lower Court on this point, and applied to the Judge for permission to remand the case for a trial on the merits, but the Judge withheld his sanction to the remand, being of opinion that the Sudder Ameen's decision was right. The Principal Sudder Ameen then proceeded to dispose of the case by upholding the decision of the lower Court.

A special appeal was admitted to try, whether the lower Courts were right in dismissing the suit under Section 10, Regulation II. of 1803; and 2nd, whether a fine could be imposed by the Sudder Ameen consistently with Construction 966.

The Court consider that the lower Courts have erred in their application of the Section to the subject of the suit. The only point tried in the former suit was the title by purchase. It was not contended by the defendants in that suit that the purchase money in the sale deed had not been made good, or that there had not been any advances in the preceding transaction. They denied the sale transaction altogether, and the decision was given on the single point at issue, which was simply declared to be not proved on evidence. There is not therefore any ground for the respondent's plea that the appellants are now reviving "a cause already determined by a Court of competent jurisdiction," nor any bar in law to the trial of the suit on its merits.

With regard to the second point in the certificate, the Court find the fine to be opposed to the Construction 966 which rules that the penalty in Section 40, Regulation XXIII. of 1814 can only be imposed in the form of damages, and they reverse the order.

The decision of the lower Courts is accordingly annulled, and the case remanded to the Sudder Ameen's Court, who will replace it on his file, and proceed to a regular decision.



The 31st May, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 204 OF 1849. { Regular appeal from the decision of
 Mohumed Luteef Khan, Principal
 Sudder Ameen of Goruckpore,
 dated 16th August 1849.

LALL PERTAB BUHADUR PAL, (*Defendant*), *Appellant*,
 versus

RAJAH LALL MURDUN PAL, AND, ON HIS DECEASE, MUSSUMAT
 KOOLWUNT KOOREE, WIDOW OF RAJAH LALL MURDUN PAL,
 (*Plaintiff*), *Respondent*.

THIS claim is brought for record of the plaintiff's name in the Collector's books and for possession of mouzah Poorsa, tuppeh Ruppree, pergunnah Mohowlee, by reversal of orders passed by the Criminal and Revenue Authorities; to recover Rs. 314, *wasilât*, together with personal property consisting of jewels, &c., belonging in her life-time to Mussumat Doolum Kooree, widow of Gunga Buksh. The entire value of suit is Rs. 8,636-2-9.

The Principal Sudder Ameen has given the plaintiff a decree for possession of the mouzah, and for a portion of the *wasilât* claimed. He has rejected altogether the claim to jewels and personals.

Both parties have appealed. The defendant appeals against the order declaring the plaintiff to be proprietor of the mouzah. The plaintiff appeals in regard to the jewels, and disallowed *wasilât*.

The plaintiff and the defendant are nephew and uncle. The plaint sets forth, that the grandfather of the plaintiff, whose name was Surufraz Pal, had two wives. By the first wife, he had Shumsher Buhadur Pal, plaintiff's father. By the second wife, he had three sons, 1st, the defendant, 2nd, Lall Rund Buhadur Pal, 3rd, Bijee Buhadur Pal. These latter, it is stated, have a claim to maintenance only, the plaintiff succeeding to the Raj as head and representative of his family. Surufraz Pal had, besides his legitimate children, a natural son named Gunga Buksh, who married Mussumat Doolum Kooree. The village, in dispute, together with another village named Joongra, and part of a village named Soosee Par, were assigned to Gunga Buksh. He died, and was succeeded by his widow Mussumat Doolum Kooree. Doolum Kooree held possession, and was

admitted to Settlement. The plaintiff contends that when property is made over, as was this, for the support of illegitimate children, the right reverts to the donor on failure of their issue; so that, in the present instance, the plaintiff has a valid title in his character of Rajah. He has a yet further title in virtue of a deed executed in his favor by Mussumat Doolum Kooree. He states that in Cheyt of 1248 Fuslee, or in March 1841, Mussumat Doolum Kooree drew up an *ikrarnamah*, by which she bound herself not to sell or mortgage the property, alleging that it was a gift from Surufraz Pal, and that on her death it would go to Lall Murdun Pal, the plaintiff. Mussumat Doolum Kooree died in 1254 Fuslee; disputes were carried on in the Criminal and Revenue Courts, and the defendant produced a *byenamah*, the purport of which was that Doolum Kooree had sold the mouzah to him. At length, the defendant contrived to establish himself in possession under orders of the Criminal Authorities. Whereupon the plaintiff comes into Court as claimant in virtue of his succession to the Raj, and under the *ikrarnamah* in his favor.

The defendant maintains the absolute title to the property of Mussumat Doolum Kooree, and asserts that she sold it to him in Bhadon 1254. About that time Mussumat Doolum Kooree fell sick, and left her usual place of residence for the purpose of performing religious rites; her death was announced on the very day on which the deed of sale was registered. In respect to the plaintiff's claim, it is urged, that Doolum Kooree was admitted to Settlement in 1840, and that the plaintiff did not then come forward with any objection. Further, it is recorded distinctly in the *wajib-ool-urz*, that Doolum Kooree may alienate. The defendant observes, as regards the *ikrarnamah*, that if the title of the plaintiff, as Rajah, is good, the *ikrarnamah* was wholly superfluous, for the mouzah was his already, without any such document, if Gunga Buksh died without issue. It is also urged that when the plaintiff, in 1250 Fuslee, or two years after the date of the *ikrarnamah*, presented a petition respecting the division of Soosee Par (the village of which part had been assigned likewise to Gunga Buksh), no mention of this *ikrarnamah* was made, but Doolum Kooree was described as proprietor in exactly the same terms which would be used in reference to any other proprietor. The defendant adds that neither the deceased nor the plaintiff himself ever possessed jewels of so great a value as those which go to form the subject matter of suit.

The Principal Sudder Ameen laid down three points for determination,—1st, has the plaintiff a title as having succeeded to the Raj: and is the *ikrarnamah* valid or not, or is the

byenamah produced by the defendant valid? 2nd, is the claim to the jewels made out? and 3rd is the claim to *wasilât* proved? The Principal Sudder Ameen enters into a long disquisition, which would appear to be an extract from his decision in another suit, for the purpose of showing that the *byenamah* held by the defendant is not genuine, and having disposed of this document, he proceeds to show that the *ikrarnamah*, by which the plaintiff supports his claim, is equally unworthy of acceptance. It was never presented, the Principal Sudder Ameen remarks, to the Revenue Authorities, and there is also proof that the plaintiff and Mussumat Doolum Kooree were on bad terms, consequently, that she would not have been prevailed on to execute such a deed in his favor: furthermore, the witnesses brought forward in support of the *ikrarnamah* are not credible, as they assign, speaking from their own knowledge, different reasons why the *ikrarnamah* was executed. After excluding the documents held by other party, the Principal Sudder Ameen declares the plaintiff entitled to possession of the mouzah in virtue of his succession to the Raj, and for that, and a portion of the *wasilât* claimed, a decree is passed in the plaintiff's favor. The lower Court, as above noticed, has rejected altogether, as not proved, the claim to jewels and personals.

The pleas brought forward in appeal are substantially the same with those urged in defence. It is contended that the plaintiff has failed to prove his right as head of the family, and as the *ikrarnamah* has been pronounced by the lower Court to be a forgery, the suit should have been dismissed.

The Court are of opinion that if the plaintiff had been content to rest his claim on recognized local usage, and had put in complete proof that this property, on failure of heirs of his body to Gunga Buksh, reverted to the plaintiff in his capacity of chieftain or head of his house, and had shown, moreover, why the resumption of the grant did not take effect, as it may be presumed that it ordinarily would, on the death of Gunga Buksh, but was waived in favor of his widow, a decree passed on the establishment of such facts would not be open to question. On this point however the plaintiff has not chosen to take his stand, but he has preferred to throw the whole stress of the case, or very nearly the whole, on the *ikrarnamah*. Of this document the Court entertain the same opinion as that which the Principal Sudder Ameen has recorded of it, but so thinking, the Court come to a very different conclusion as to the decretal order which must pass. In their view, the declaration that the *ikrarnamah* is spurious is utterly fatal to the plaintiff's claim. It would be to countenance an unsound and most mischievous doctrine

to hold that when a deed on which a plaintiff specially bases his claim is found to be fabricated, that document may be placed out of sight, and the claim still allowed on the ground of general right. The Court do not go so far as to say that the execution of such a deed is necessarily irreconcilable with the plaintiff's title as Rajah, that it is unable to stand together with it, for it is possible that a person in the plaintiff's situation might be led, in his anxiety for the future, to guard a clear reversionary title by the requisition of a security admittedly superfluous. But that the *ikrarnamah* before the Court was not really executed by Musumat Doolum Kooree scarcely admits of a doubt. Its date is 1841, or a year after the Settlement had been concluded with Doolum Kooree. Had Doolum Kooree been persuaded to execute such an instrument, the plaintiff would assuredly have given publicity to it, by presenting it to the Collector or other authority, instead of which it is never heard of till, on the death of Doolum Kooree, in 1847, the opposite party in this suit preferred a claim, under a *byenamah* to other property which had been held by Doolum Kooree, and then for the first time the *ikrarnamah* is forthcoming. It is an argument of less strength against the *ikrarnamah*, but still of force, that since the right of Doolum Kooree had been so fully acknowledged at the Settlement, without opposition on the part of the plaintiff, Doolum Kooree was little likely to have yielded all to the plaintiff without any consideration, and simply on his asking for it, not to say that, according to the finding of the Principal Sudder Ameen, the plaintiff and Doolum Kooree were on bad terms; and it may be observed, further, that the witnesses for the plaintiff being almost all dependant on him, and subject to his influence, their testimony in his favor is very far from convincing, or such as commands weight.

The Court reverse the judgment of the Principal Sudder Ameen on the grounds above stated, and dismiss the plaintiff's claim.

The 31st May, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 213 OF 1849. { *Regular appeal from the decision of
Mohumed Luteef Khan, Principal
Sudder Ameen of Goruckpore, dated
16th August 1849.*

RAJAH LALL MURDAN PAL, (*Plaintiff*), *Appellant*,
versus

LALL PERTAB BUHADUR PAL, (*Defendant*), *Respondent*.

THE particulars of this case are given in case No. 204, decided this day. The appeal is instituted for the recovery of the value of jewels and *wasilat* disallowed by the Principal Sudder Ameen. For the reasons stated in case No. 204, the Court dismiss the plaintiff's appeal, and confirm the judgment of the Court below.



The 4th June, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 75 OF 1848. { Regular appeal from the decision of
Mohumed Mohsum, Principal Sudder
Ameen of Banda, dated 28th February
1848.

SHEOCHURN AND OTHERS, (*Defendants*), *Appellants*,
versus

PUHLWAN SINGH AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS suit is brought for possession of 580 beegahs of land declared to belong to mouzah Bubra, the property of the plaintiffs; to refix the ancient boundary of the village, and to recover *wasildt* from 1223 to 1253 Fuslee: total value of suit Rs. 42,746.

The lower Court passed a decision in favor of the plaintiffs.

The facts of the case, as set forth by the parties themselves, are as follow. The plaint states that mouzah Sigrou, of which the defendants are proprietors, formerly belonged to Rugoo, Poorun and others, and that mouzah Bubra belonged to Choha, father of Puhlwan Singh and others, plaintiffs. The two mouzahs are conterminous. The boundaries had been marked off, and no dispute in respect to them existed till in 1217 Fuslee, Chotoo and others, zemindars of Sigrou, encroached on the land of Choha. Choha sued certain of the defendants for the rent of the land (145 beegahs) thus appropriated, and, on the 10th August 1810, the ancestors of the plaintiffs obtained a summary decree for Rs. 217-8. Choha, with the consent of the other party, set up the ancient land marks, obtained possession of 580 beegahs *kutchas*, or local beegahs apparently, equivalent to 145 *puckas* beegahs), and peace was restored. Gujadhur, father of certain of the plaintiffs, purchased the estate of Sigrou from the old zemindars on 12th December, 1810. He afterwards purchased the above 580 beegahs as the right of Choha. Hindoo Singh, father of certain of the defendants, claimed the Sigrou estate on what the plaintiffs allege to be a forged *byenamah* of 1863 of the Sumbut year, and got a decree against Rugoo, Poorun and others; but as Gujadhur was already in possession, he was instructed, if he wished to obtain possession, to sue Gujadhur likewise. He sued him accordingly, and obtained a decree on the 9th June 1814, and he was recorded as proprietor. He got possession in 1222 Fuslee, or 1815 A. D.,

forcibly seized the 580 beegahs, and ejected the ancestor of the plaintiffs, under the pretence that what he thus seized appertained to the village of Sigrou, of which he had become proprietor by purchase. On the 3rd March 1819, Hindoo Singh sued to set aside the summary decree of 10th August 1810, impleading Choha, and demanding to be put in possession of the 580 beegahs. He got a decree in 1821. The suit was appealed, remanded, and afterwards struck off the file. Hindoo Singh applied to the Court of appeal, and at length the subject having been brought before the Sudder Court, a review of judgment was ordered, and Hindoo Singh was permitted to put in an amended plaint. The Sudder Ameen, in 1839, reversed the summary decree, thereby passing a decree in favor of Hindoo Singh, but did not order that he be placed in possession, because his vakeel stated to the Court that Hindoo Singh was already in possession. The plaintiffs appealed, and the Judge in 1842 held that the right was on the side of the plaintiffs; he therefore reversed the Sudder Ameen's order, confirmed the summary decree, and directed that plaintiffs be put in possession. The plaintiffs got possession accordingly in 1843. Hindoo Singh applied for, and obtained a review of this judgment. The Judge in 1844 again upheld the summary decree, but altered the order of the Court in regard to possession, and gave possession to Hindoo Singh, on the ground that the order, dispossessing him in 1842, had been irregularly made. Hindoo Singh preferred a special appeal, and, on 25th June 1844, his appeal was disallowed. Sheochurn and others, defendants, having got possession in 1845, under the Judge's order in the reviewed case, ejected the plaintiffs. Whereupon the plaintiffs have instituted this action, and they maintain that their right was acknowledged by the Judge in 1842, and as they have been forcibly dispossessed, their claim comes under the provisions of Regulation II. of 1805, which fixes sixty years as the legal limit under the above circumstances. They urge, moreover, that they were in possession from April 1843 to July 1845, so that in whichever light viewed, their suit is within the time allowed, whether regard be had to the statute which fixes the limitation at sixty years, or whether it be had to the fact of their temporary possession under the decree of the Judge in 1842.

It is replied by the defendants, heirs of Hindoo Singh, that the land in dispute belongs and ever has belonged to Sigrou. Choha sued the Sigrou zemindars in 1810, as above, for the rent of 145 beegahs of land, and obtained a decree. With the help of the *omlah*, the words "*neez dukul*" were fraudulently inserted in one of the summary suit *misl*. Choha did not however get possession. Hindoo Singh bought the estate from the zemindars of Sigrou in 1862 of the Sumbut year, correspond-

ing with 1804 A. D., that is before the summary decree had been had. In 1812, Hindoo Singh obtained a decree for the entire estate of Sigrou, but was refused possession, on the ground that possession was held by Gujadhur. He therefore sued Gujadhur, obtained a decree, and, in the execution thereof in 1815, possessed himself of the entire estate of Sigrou, the disputed 580 beegahs inclusive. Choha in 1816 complained that the landmarks of the two mouzahs had been removed, and a forgery having been discovered in the papers of the summary decree case, certain of the *omlah* were punished by the Criminal Courts. In 1819, Hindoo Singh sued to set aside the summary decree, and his claim was allowed in 1821. After much further litigation on both sides, Hindoo Singh revived his suit, having received permission to file a supplemental plaint. The Sudder Ameen, in 1839, gave a decree in his favor, in reversal of the summary order. In 1842, the Judge reversed these proceedings, passed a decree in favor of the plaintiffs, and ordered that they be put in possession. In 1844, on review of judgment, the summary decree was again affirmed by the Judge, but, on this occasion, possession was ordered to be given to Hindoo Singh. A special appeal was preferred by both parties, not by the defendants only, as the plaintiffs desire to make out. Both special appeals were thrown out. It is contended in defence that under Regulation II. of 1803, and Construction 999, the suit cannot be now tried, having been tried already. It is also urged, the plaintiffs never having had possession, their suit is barred by lapse of time. It is pleaded that Hindoo Singh, on the execution, in 1815, of his decree, obtained possession of the whole of mouzah Sigrou, the disputed tract inclusive. It is further pleaded by the defendants that Regulation II. of 1805 does not apply to this case, because, on the showing of the plaintiffs, the old zemindars, from whom Hindoo Singh purchased, committed the aggression complained of, not Hindoo Singh himself, and finally, though several Settlements have been effected since the period of the alleged wrong, yet at no Settlement was complaint made by the plaintiffs of this forcible dispossession.

The Principal Sudder Ameen laid down two points for consideration. 1st. Has this suit been tried already. 2nd. Is it barred by lapse of time? The first suit was brought, the Principal Sudder Ameen remarks, by the ancestor of the defendants, for the reversal of the summary decree passed in 1810, the right of the plaintiffs was admitted by the Court in 1842, and again in 1844, and this finding was upheld in 1845 by rejection of the special appeal, which the defendants preferred. The present action is brought for the purpose of displacing possessors who have established themselves by force, and there is nothing in

dismissal of the suit of Hindoo Singh, as against the present plaintiffs, which can bar the institution of the present claim, the cause of action is not the same, because the defendants sued for the land as belonging to Sigrou, and the plaintiffs sue for it as forming a part of Bubra. Let us suppose this case. A person seizes an estate and sues in Court, but unsuccessfully, he nevertheless retains possession; now, in the case supposed, can the rightful owner obtain what he is entitled to without a suit in Court? The plaintiff sued under the provisions of a law which allow sixty years as the limitation, and the possession, moreover, of the defendants, who succeeded the violent usurper, is within twelve years; if the defendants had not had wrongful possession, their suit would not have been dismissed, and again, the possession had intermediately by the plaintiffs, under the decree passed in their favor in 1842, brings the suit within the ordinary prescribed period. How, asks the Principal Sudder Ameen, could a decree for rent have been given if the ancestors or the plaintiffs had not formerly held possession of the property in dispute. Their title was declared by the Judge in 1844 to be good. It is shown that Gujadhur bought the 580 beegahs from Choha; if it were land appertaining to Sigrou, why should he purchase it, seeing that he had already purchased the rights of the zemindars of Sigrou? In regard to the special appeal preferred by the plaintiffs, the Principal Sudder Ameen observes that it was rejected on grounds merely technical. He held that the plaintiffs had proved their claim, and accordingly decreed in their favor.

The appellants urge that it is not open to the plaintiffs to plead after this equivocal fashion, asserting that the legal limit is sixty years on the ground of their forcible dispossession, and that the suit also comes within the ordinary limit of twelve years by reason of the temporary possession which was conferred on them by the decree of the Judge in 1842. The appellants contend that they got possession of Sigrou in virtue of a decree of Court; if possession were then had of more than had been decreed to them, the objection should have been put forward on the execution of the decree. Again, if the land in dispute really belongs to Bubra, it is reasonable to suppose that the plaintiffs would have complained to the Revenue Authorities of an excessive jumma. Further, it is urged that the suit is brought a second time, the claim to possession put forward by Choha having been dismissed in 1844; so that this is the same action under a new form. It is averred by the appellants that both the *byenamahs* under which Gujadhur is made out to have purchased all Sigrou from the old zemindars of that mouzah, and a portion of Bubra from Choha, are fabricated, and it does not follow, the

appellants add, that when the claim of the defendants to reverse the summary decree was disallowed, therefore the right of the plaintiffs to this tract of land was acknowledged.

In the opinion of the Court the judgment which has been passed by the Principal Sudder Ameen cannot be sustained. The inadmissibility of the style of pleading adopted by the plaintiffs, so as to avail themselves of the benefit of the sixty years' limitation law, and if that plea fall to the ground, to bring their suit within the ordinary legal period of twelve years, is manifest. The possession had by the plaintiffs in 1843 under an order of the Judge, which this Court have declared in their letter No. 861 of the 2nd May 1843 to be irregularly made, is not possession within the meaning of the law. The words then used by the Court are "the consequence of your decision is to oust Hindoo Singh from land, for the right or proprietary occupation of which no suit has been instituted against him; an anomaly which is certainly inconsistent with all law and precedent." The sole ground, therefore, on which the plaintiffs can appear in Court at all, and demand a decision of the case on its merits, is the exceptional enactment of Regulation II. of 1805, Section 3. This plea should have been set forth by the plaintiffs in the most distinct terms. The Principal Sudder Ameen should have made it the leading point for enquiry under the Circular Order of 13th September 1843, and he should have called on the plaintiffs to furnish special proof in support of the plea: this the Principal Sudder Ameen failed to do, and the plea, though made, is not proved. It was not enough for the Principal Sudder Ameen to declare that proof of forcible dispossession may be found in the fact that Hindoo Singh lost his suit instituted for reversal of the summary decree, that it may be found in the summary decree itself, and on reference to previous proceedings of the Courts. The Court look upon the present case of dispossession as a common, not a special case, not such as entitles the plaintiffs to relief under Regulation II. of 1805. It is beyond question, whether the land in dispute really pertain to Bubra or to Sigrou, that Hindoo Singh possessed himself of it in 1815, on the execution of his decree; if rightfully, he possessed himself of it in virtue of that decree; if wrongfully, under cover of that decree; and it is equally certain, that excepting for the period during which the Judge of Banda irregularly deprived him of possession, he has held possession ever since. The remedy of the plaintiffs lay in an action to be brought within twelve years from the year 1815, as in ordinary cases, and the plaintiffs cannot maintain that they were ignorant that such was the course to be pursued, for the record of the case contains a petition of Choha in 1817, in which he complains

that Hindoo Singh has destroyed all trace of the ancient boundary, and on which the order passed was, that Choha should sue for possession. In fine, the Court are of opinion that suits tenable under Section 3, Regulation II. of 1805 must of necessity be rare, regard being had to the facility of redress which our system affords, and that the present is not one of those rare cases.

The Court accordingly reverse the decision of the Principal Sudder Ameen, and dismiss the claim of the plaintiffs.

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The 11th June, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

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CASE NO. 16 OF 1851. { *Special appeal from the decision of C. C.
Jackson, Esq., Officiating Judge of
Meerut, dated 7th September 1850.*

GUNESH RAI AND MUNOHUR LALL, (*Plaintiffs*), *Appellants,*
versus

GIRDHAREE LALL AND OTHERS, (*Defendants*), *Respondents.*

THE printed decisions for September 1850 contain the particulars of this case.

A special appeal was granted to try, whether the Judge should not have nonsuited the plaintiffs, instead of dismissing their claim.

In the opinion of the Court, the decision of the Judge is incorrect, with reference to the point raised by the certificate. The Sudder Ameen dismissed the claim of the plaintiffs, and the Judge in appeal confirmed the Sudder Ameen's order. The Judge remarks, "I consider the claim made in no way supported by the evidence produced, and a debt arising out of joint transactions in Shamlee, zillah Saharunpore, cannot be made the subject of a suit in this zillah, by one of the party concerned having subscribed his name to an entry in the books of a party at Meerut, even were that fact duly established in evidence, which is not the case." In other words, the fact pleaded has not been found, and even had it been found, it would not have rendered cognizable at Meerut a claim arising "out of joint transactions in Shamlee: on the Judge's own shewing, therefore, he had no jurisdiction, and as the penalty which attaches to the institution of a suit in a zillah other than that in which it is legally cogni-

zable, is nonsuit, not absolute dismissal, the decree is faulty; and the Court have to observe further that when an order for nonsuit is necessitated by the circumstances of a case, all comment on the merits of the claim should be forborne.

The Court annul the decision passed by the Judge, and nonsuit the plaintiffs.

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The 11th June, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 17 OF 1851. { *Special appeal from the decision of C. C. Jackson, Esq., Officiating Judge of Meerut, dated 14th August 1850.*

RAM BUKSH, (*Plaintiff*), *Appellant*,

versus

GUNGA PERSHAD, (*Defendant*), *Respondent.*

THE volume of the printed decisions for August 1850 give the particulars of this case.

A special appeal was granted to try, whether the Judge was warranted in setting aside the decision of the arbitrators in this case, in the absence of any proof that the award was given through partiality or corruption.

The Court are unanimous in thinking that the Judge's decision must be reversed. The suit was brought to redeem a mortgage, and while it was under trial in the Court of the Moonsiff, the parties consented to decide it by arbitration. A majority of the arbitrators gave an award in favor of the plaintiff, and the Moonsiff passed a decree in conformity to their finding. The defendant having appealed to the Judge, the latter remarks thus. "The cause of action in this suit arose forty years ago, and the claim is on a mortgage, for which the plaintiff can produce no documentary evidence; and it is positively denied by the defendant. The pleadings were consequently at issue on that point, and until sufficient proof was established of the fact of the mortgage, the Court could not, under Clause 4, Section 3, Regulation II. of 1805, entertain the suit. The Moonsiff, consequently, refrained from enquiring into the merits of the case, though he quotes that Regulation as authority for retaining it on his file. In my opinion, proof of mortgage should have been obtained to enable him to do so; but then, not being authorized to investigate it, he refers it to the decision of arbitrators, agreed to by the parties, a majority of whom decide in favor of plaintiff, without

giving any reasons for their decision, and the defendant protests against it as obtained by corrupt means; but it is confirmed by the decision of the Moonsiff, in which I do not concur, because the suit could not be legally entertained by the Moonsiff until the mortgage, and subsequent forcible or fraudulent occupation, had been satisfactorily established by evidence, which not being produced, the case should have been dismissed. I decide in favor of appellant, with costs." The Court do not find in Clause 4, Section 3, Regulation II. of 1805, the meaning which the Judge has put upon it. The words of that law are, "provided further, that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage, or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depositor only, without any proprietary right; nor in any other case whatever wherein the possession of the actual occupant or of those from whom his occupancy may have been derived, shall not have been under a title *bona fide* believed to have conveyed a right of property to the possessor." By the Moonsiff's citation of the above, the Court understand him simply to rule that as efflux of time does not operate in bar of the right to redeem a mortgage, the present action is not vitiated because not laid within the period fixed for the institution of suits of other descriptions. And the award is not invalid, as the Judge holds, because the arbitrators did not assign reasons, and because the defendant protests against the award: in cases in which the award is not sufficiently specific, the matter may indeed be referred back to the arbitrators; and the award may be set aside altogether, not, however, on the mere protestation of the losing party, but on proof to the satisfaction of the Court* that the arbitrators have been guilty of gross corruption or partiality. On no other ground is a Court competent to set aside an award.

* Section 9, Regulation XXI. of 1803.

The Court, for the reasons above stated, annul the decision of the Judge, and pass a decree in favor of the plaintiff.



The 11th June, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 20 OF 1851. { *Special appeal from the decision of W. P. Masson, Esq., Officiating Judge of Goruckpore, dated 18th September 1850.*

RAJAH OODENABAIN MULL, (*Plaintiff*), *Appellant*,

versus

JANKEE NATH, *tewarree*, (*Defendant*), *Respondent*.

THE printed decisions for September last, give the history of this case.

A special appeal was allowed to try, whether it was competent to the Judge to entertain an appeal on the part of Jankee Nath, who had not been made a defendant in the Court of first instance; also, whether the Judge should have dismissed the claim of the plaintiff on the ground of the minority of the defendant Loke-Nath.

The Court hold that the decision of the Judge cannot, under the peculiar circumstances of this case, be interfered with. It is quite true, that in ordinary cases no one may appeal from a decision in a suit to which he was not a party. But the present is a special case. The appellant, when the suit was under trial by the Moonsiff, objected that the defendant was a minor and under his guardianship. The Moonsiff, believing from the evidence placed before him, that the defendant was of full age, overruled the objection on the point of minority, and gave the plaintiff a decree against the defendant; the appellant re-asserted his objection before the Judge, and it is evident that there was no way of bringing to the test the validity of so vital an objection, but by allowing the appellant to intervene. For, both in the Moonsiff's Court and in that of the Judge, the defendant declared himself to be of full age, and even had he adopted an opposite course, and had carried up to the Judge an appeal from the Moonsiff's decision on the ground of minority, his appeal would, as a matter of course, have been thrown out, as one which the Court could not entertain unless performed by his guardian in his behalf; or in other words, the appellant, Jankee Nath, *tewarree*, would, in the case supposed, have received a suggestion from the Court to do that which he has now done of his own accord. It is not enough that the defendant persists in the averment of his majority; the point is one which it is essential to try, for otherwise the interest of a minor would be at the mercy of any one

who might succeed in practising on his weakness and inexperience. The propriety of admitting interveners "for some just reason," has, the Court remark, been expressly recognized by MacPherson in his *Treatise* * on the procedure of the Civil Courts, and without any doubt, the obligation of a guardian to protect the interests of his ward constitutes a just reason for the guardian's interference. The Court therefore dismiss the appeal.

* Page 428.

The 11th June, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 21 OF 1851. { *Special appeal from the decision of*
W. P. Masson, Esq., Officiating Judge
of Goruckpore, dated 18th September
1850.

RAJAH OODENARAIN MULL, (*Plaintiff*), *Appellant,*

versus

JANKEE NATH, *tewarree, (Defendant), Respondent.*

THIS case is precisely similar to case No. 20 decided this day. For the same reasons, the Court dismiss the appeal.

The 11th June, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 48 OF 1850. { *Regular Appeal from the decision of*
Qazie Yar Ali Khan, Principal
Sudder Ameen of Zillah Jounpure,
dated 27th December 1849.

SHEOODUHUN SINGH AND DOORGA PERSHAD SINGH, (*in formâ pauperis*), (*Plaintiffs*), *Appellants,*

versus

SHEO PERSHAD AND OTHERS, (*Defendants*), *Respondents.*

THIS was a suit to set aside the auction sale of mouzahs Choorasee, &c., and to recover *wasildt*, the total claim being estimated at Rs. 7,113-6: plaintiffs' case is thus stated. The mouzah in

question is their hereditary property, and was mortgaged by them in 1221 Fuslee to Gokul Chund for Rs. 4,100. On the 1st July 1814, Gokul Chund assigned the estate to Ajoodheea Pershad, his partner, on account of a debt. Ajoodheea retained possession till 1234 Fuslee, on his death, Mahanund, *karinda* of Eesurnath and Sheo Pershad (the sons of Ajoodheea), instituted a suit against Devee Pershad, brother of Doorga Singh, plaintiff, on account of *malgoozaree*, and obtained a decree. On the 9th August 1827, Chotee Lall, brother of Ajoodheea Pershad, got plaintiffs to execute a second mortgage to him for Rs. 5,000, being the amount of the submortgage and decree, and, with the consent of the sons of the original mortgagee, Gokul Chund, the name of Chotee Lall was recorded in the Collector's books. Plaintiffs then instituted a suit for the redemption of the mortgage against the representatives of Gokul Chund and Ajoodheea Pershad, and a balance of Rs. 1,980-12-6 was found to be due to the mortgagee; on payment of which possession was ordered to be given to plaintiffs. This decree was affirmed in appeal under date 9th January 1843. Subsequently, Sheo Pershad and Jygopal instituted a suit in the Mirzapore Court against plaintiffs, on account of the amount of the original mortgage debt and interest thereon, equal to the principal, and, on the 26th July 1843, got a decree. Plaintiffs appealed to the Sudder Court, but while the appeal was pending, the decree-holders took out execution of their decree, and, on the 19th June 1844, brought to sale plaintiff's village, which was purchased by Sheikh Mohamed Buksh and Lalla Buddoo Lall for Rs. 10,800. On the 26th December 1844, the decree of the Mirzapore Court was reversed by the Sudder Dewanny Adawlut, and the plaintiffs (Sheo Pershad and Jygopal) nonsuited. The decree, in execution of which their estate was sold, having thus been reversed, plaintiffs urged that the sale itself must be annulled.

The defendants, Buddoo Lall and Mohamed Buksh, auction purchasers, who alone defended the suit, argued, that as the sale was conducted with perfect regularity, in execution of the decree obtained by Sheo Pershad and Jygopal, it could not now be set aside. They, also, pleaded, that the *wasilat* account, filed by the plaintiffs, was altogether incorrect.

The Principal Sudder Ameen was of opinion that the sale of the plaintiff's village was not invalidated by the reversal of the decree, in execution of which it was sold, as the decree had not been set aside at the time the sale took place, and no order had been received from the Court to postpone the sale, nor had the plaintiffs tendered security under the provisions of Regulation XIII. of 1808, to suspend execution of the decree obtained against them. Further, the decree of the Sudder Dewanny Adawlut contained no declaration that the sale, intermediately effected, should

be null and void. No irregularity was apparent in the conduct of the sale, which would invalidate it, under the provisions of Regulation VII. of 1825. The Principal Sudder Ameen, also, referred to the provisions of Section 17 of Regulation V. of 1812, as declaring that, in such cases, an action would be for *damages*, but not for the reversal of the sale. The Principal Sudder Ameen having thus disposed of the main point in the plaintiffs' suit, the dismissal of that part of their claim, which related to *wasildt*, followed as matter of course.

The Court are unanimous in holding that the decision of the Principal Sudder Ameen is opposed to the plainest principles of justice, and cannot be sustained. It is utterly absurd to declare that when the decree, in execution of which property has been sold, is reversed, in appeal, the sale nevertheless shall stand. The absence of any irregularities in the conduct of the sale, cannot confer validity on that proceeding, where the original right to sell has been revoked. The reference made to Section 17, Regulation V. of 1812 by the Principal Sudder Ameen is quite out of place; that law applying exclusively to cases of distraint of personal property, for arrears of rent, and a little more consideration would have prevented the Principal Sudder Ameen from falling into so grave an error as that of quoting it in support of his present judgment.

The Court reverse the decision of the Principal Sudder Ameen, and annul the sale of the plaintiffs' estate, who will be entitled to recover possession under the decree obtained by them on the 9th January 1843, on payment of the amount declared to be due to the mortgagee's representatives. The Principal Sudder Ameen under the view taken by him of the case not having entered into the subsidiary question of the *wasildt* claimed by the plaintiffs, a matter which cannot be conveniently enquired into by this Court, the case is remanded to that functionary, with instruction to call on the parties for their respective evidence on this point, and to pass a decision thereon.



The 11th June, 1851.

Present : S. S. BROWN, *Offg. Judge.*

CASE No. 107 OF 1851. { *Special appeal from the decision of R. J. Tayler, Esq., Judge of Jounpore, dated 30th December 1850.*

SYED INAYUT HOOSSEIN, (*Plaintiff*), *Appellant*,

versus

MUSSUMAT HINGUN BEEBEE, (*Defendant*), *Respondent*.

THE decision of the Judge, which briefly upholds the order of nonsuit passed by the Moonsiff in this case, is in the decisions of the month.

A special appeal was admitted to try, whether the lower Courts had rightly nonsuited the plaintiff.

The plaint states that defendant occupied by permission a house belonging to plaintiff's ancestor, Zoolficar Ali, which had descended to plaintiff. The house fell into disrepair, and defendant, during plaintiff's absence, appropriated and sold the materials, and afterwards promised to make good their value to plaintiff, but had failed to fulfil it, and the suit was brought for the recovery of Rs. 32, value of the same.

Defendant replied that her husband had obtained the house in gift from Zoolficar Ali, and that the materials had been appropriated by her during Zoolficar Ali's life time without any objections on the part of plaintiff. It was also urged, in support of a plea of nonsuit, that the plaintiff had not specified whether the house was the hereditary property of Zoolficar Ali, or how the proprietary right had been acquired by plaintiff. If by virtue of inheritance, then the other heirs should have joined in the suit.

The Moonsiff, to these assumed grounds of nonsuit, added another objection to the plaint, that it did not set forth in what year defendant's husband had obtained leave to occupy the house, and whether the permission were a written or verbal one.

The order of nonsuit has clearly been passed on insufficient grounds. The plaintiff has not sued to establish an ancestral share in the property, and therefore any specification of the persons through whom he derived his title was unnecessary, neither is there any obscurity in the statement in the plaint that could be an impediment to the decision of the matter at issue between the parties, viz. the ownership, and the agreement to satisfy the demand. The order of nonsuit is reversed, and the case remanded to the Court of the Moonsiff, who will proceed with it as usual.

The 11th June, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 98 OF 1851. { *Special appeal from the decision of A. Lang, Esq., Judge of Allahabad, dated 24th September 1850.*

SHEIKH AMUDEE AND OOMDUT-OONNISSA, (*Plaintiffs*), *Appellants*,
versus

CHANUT-OONNISSA AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are in the volume of the decisions for the month. The Judge ruled that it was incumbent on the mortgagee to issue the usual notice of foreclosure prescribed in Section 8, Regulation XVII. of 1806, on the party who held possession of the property by purchase at public sale as the "legal representative" of the mortgager, and the authority of the decision of the Calcutta Court of the 1st September 1847, Sye Shunkur Chund, appellant, which appeared to the Judge to be not consonant with the requisitions of the law, was disallowed, and a nonsuit declared.

A special appeal was admitted to try, whether the ruling of the Judge with regard to the Section 8, Regulation XVII. of 1806, was correct.

The Court consider that the ruling of the Judge on this point must be upheld, and that a party who succeeds under a title derived from a public sale is as much the "legal representative" of the mortgager as the natural heir. They also concur in the Judge's opinion that the mere circumstance of the sole purchaser's cognizance of the property being liable to foreclosure will not absolve the mortgagee from the strict requisition of the law, in the service of the foreclosure notice on him, failing which, the penalty of nonsuit, under Construction No. 1140, will attach to the suit.

At the same time, the Court are of opinion that the Judge has erred in considering the decision referred to by him to be at variance with his own conclusion on this point. In the case in question, the mortgager had, in the interim, executed a private transfer of his interests to a third party, but he had no power to constitute this party his "legal representative" in the mortgage contract, and it was ruled accordingly that such private transfer would not affect the service of the notice of foreclosure by the mortgagee, whose engagement was with the mortgager, and with

him only. The cognizance by the party in possession of the issue of the notice was also incidentally mentioned; there can be no analogy between the case in the precedent and a compulsory transfer, carrying with it, *prima facie*, a valid title at law, as in the case before the Court. The appeal is dismissed.

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The 11th June, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, *Offg. Judge.*

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CASE No. 99 OF 1851. { *Special appeal from the decision of*
 Ruzzee-ooddeen Khan, Principal
 Sudder Ameen of Allypurrh, dated
 27th July 1850.

PERSHADEE LALL, (*Defendant*), *Appellant,*
 versus

MUSSUMAT BHAMA, (*Plaintiff*), *Respondent.*

THE plaintiff brought a suit for proprietary possession of a thatched house and of some ground attached to it in the town of Khasgunge against six persons, and in his plaint he explained that three of the defendants, who occupied a portion of the ground as his tenants, had been included in the suit for form. These defendants, on notice being served, filed confessions of judgment.

The Moonsiff dismissed the suit, rejecting the confessions of judgment as collusive; the Principal Sudder Ameen in appeal upheld the dismissal of the suit *quoad* three of the defendants, but was of opinion that a decree should have passed against the three who confessed judgment, which he considered to be of effect against themselves, although of no force against the other defendants. The Moonsiff's decision was accordingly amended, and a decree given against those parties. A special appeal was admitted to try, whether the Principal Sudder Ameen was right in decreeing against the parties who confessed judgment in the lower Court.

The question of right in this case having been tried and decided between the plaintiff and those of the defendants who had pleaded to the merits, the admission of the claim by persons, who, by the plaintiff's own showing, had been unnecessarily made parties to the suit, could not benefit the suit, and the confessing defendants not being in possession of any portion of the right claimed, they had none to confess to. This part of the Principal

Sudder Ameen's decision is in effect a nullity, although the other defendants have chosen to appeal it, considering the amendment detrimental to their interests. Such acknowledgments must be viewed in a different light from confessions of judgment in personal claims, in which the confessing party is decreed against as a general rule, and were properly dealt with by the Moonsiff. This part of the decision of the Principal Sudder Ameen is accordingly reversed. The costs of appeal will be paid by the respondent.

The 11th June, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DRANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 45 of 1851. { *Special appeal from the decision of
Moulvee Mohamed Husna Khan,
Principal Sudder Ameen of Myspoorie,
dated 19th September 1850.*

BUKHTAWUR AND RAMDHUN, (*Defendants*), *Appellants*,
versus

RUTTEE RAM AND OTHERS, (*Plaintiffs*), Respondents.

THE plaintiffs brought their action for possession of 5 biswaha in mouzah Ajeetgunge, forming lot No. 2, which fell to their share in a recent division of the property, and their plaint sets forth that a division having been called for by the disputes of the sharers, it was set on foot, and completed in the Revenue Department in the usual form; but that the Collector withheld his approval of it, and the suit was accordingly instituted to enforce the division.

Several of the defendants filed confessions of judgment, but the claim was resisted by two of the number, who urged that plaintiff had incurred a nonsuit in having sued for possession under a division admittedly incomplete, instead of bringing their suit for a division *de novo*.

The lower Courts decreed the claim chiefly on the ground of the parties having recorded an agreement at the time of Settlement to make a division when required, and they considered the Collector's order to be of no force in the face of this agreement. The plea for a nonsuit was overruled.

A special appeal was granted to try, whether the decisions of the lower Courts were not opposed to Section 5, Regulation IX.

of 1811, and Section 30, Regulation XIX. of 1814, and to a precedent of this Court, Bukshee Ram, *versus* Sheo Buksh, 23rd August 1849.

The Court understand from the terms of the certificate, that it was granted to try the correctness of the decisions of the lower Courts in decreeing a division of shares represented by fractions of a rupee in a *bhyachara* tenure, the precedent of the 23rd August 1849, turning on this point, but they do not find the fact of the estate being a *bhyachara* one (which is assumed in the certificate) to be borne out by the record. The description of the tenure in the *wajib-ool-urz* agreement is identical with the description of a joint estate in common tenancy contained in the Circular Order of the 3rd August 1847. The reasons assigned by the Collector for refusing his sanction to the division rest on different grounds, and the order is rather in favor of the fact of the simple character of the tenure than against it. Further, the respondents have not advanced any plea on this point here or in the lower Courts, and upon the plea for a nonsuit which has been reviewed in special appeal, the Court, under the terms of the certificate, is precluded from entering. The appeal is dismissed.

The 16th June, 1850.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 139 OF 1850. { *Special appeal from the decision of A. Speirs, Esq., Judge of Cawnpore, dated 22nd January 1850.*

RAJAH DOORGA PERSHAD, (*Defendant*), *Appellant,*
versus

KOONWUR TIKYT SINGH AND OTHERS, (*Plaintiffs*), *Respondents.*

THE decision on this case is in the volume for the month.

The chief point involved in the decision is stated in the following extract from the Judge's decision. "The chief question to be determined is whether the Civil Court has power to reverse a sale which has been regularly conducted, and whether a sale effected according to an order which was subsequently declared void and of no effect, must also be held void, or upheld." This point the Judge decided in the affirmative, as follows. "In the present case the Sudder Court on the 5th and 22nd April 1845, held that the demand of the plaintiff (now defendant) was illegal; that the plaintiff was not entitled

to the sum he had demanded. If the demand was illegal the order to realize it was also illegal, and the sale of defendant's property made to realize that illegal demand, must be reversed."

The certificate of special appeal was granted to try, whether the Judge's decision on this point was right in law.

The liability of a sale to reversal on the reversal of the judicial order or decision which occasioned the sale has been already determined in a late judgment of the Court, Sheo Dahun, appellant *versus* Sheo Pershad, respondent, 11th June 1851. The ruling of the Court is equally applicable to this case. The appeal is dismissed with costs.

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The 16th June, 1851.

Present : { A. W. BEBBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE No. 227 OF 1850. { Special appeal from the decision of G. F.
 Franco, Esq., Judge of Saharumpore,
 dated 30th May 1850.

NARAIN DASS, (*Defendant*), *Appellant*,
 versus

MEHREAN ALI AND OTHERS, (*Plaintiffs*), *Respondents*.

THE decision appealed from is in the volume of the decisions for the month.

The plaintiffs brought their action for the right of præemption of a share in the mouzah, against another sharer, Deedar Ali, the seller, and Narain Dass, the purchaser, which was decreed in both Courts. The suit having been brought under the Mohumedan Law of præemption, a special appeal was admitted to try whether, when the evidence to the protest and demand had been discredited in both Courts, the presentation of a *suwal* to the Collector's office could be held to be a sufficient fulfilment under the Mohumedan Law of the conditions of the præemption claim.

Evidence to the preliminaries of the protest and demand, as laid down in page 183 of *MacNaghien's Mohumedan Law*, is essential to the proof of the præemption claim, *vide* page 182, and application to a third party, which the plaintiffs, it appears, adduced as a further proof of their desire to purchase, cannot be regarded as making up for any defects in the original conditions. In disallowing the evidence to these, the Courts in effect pronounced decisively against the claim. The Principal Sudder Ameen has cited a *futwa* of the Mohumedan Law Officer of this

Court in support of his finding, but on referring to it the Court observe that the facts in dispute in the case are all assumed in the questions propounded to the Law Officer, and the opinion thus obtained cannot, in consequence, be allowed any authority.

The respondents' vakeel has pleaded verbally that the claim was preferred on the ground of the mutual agreement at the time of Settlement, as well as on the Mohumedan Law, and he has pointed to a single sentence in the body of the plaint in support of his assertion; but the Court find that the pleadings and proofs have been confined entirely to the latter, and as it has been ruled by the Court in their decision of the 8th June 1847, No. 105, that the præemption claim on the Settlement agreement rests on a distinct basis from that of the *huq shoofa*, the plea is wholly inadmissible.

The decisions of the lower Courts are reversed, with costs.

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The 16th June, 1851.

Present : { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

CASE No. 10 OF 1851. { *Special appeal from the decision of G. F. Harvey, Esq., Officiating Judge of Cawnpore, dated 17th July 1850.*

BULDEO SUHAI AND HURDIAL, (*Plaintiffs*), *Appellants*,

versus

KURUM BEEBEE AND AYMUN BEEBEE, (*Defendants*), *Respondents*.

THE Judge's decision is in the book of decisions for the month.

The respondents' names were inserted under the signature of their son and brother, Buksh Hoosein Khan, as *mookhtear* for them, in a deed of sale of a mouzah said to have been executed in favor of appellants by them, and the other sharers jointly, and an application for registry is alleged to have been made a few days afterwards by the sellers, accompanied by a *mookhtearnamah* from the two women empowering the same party to act for them in completing the registry. In the suit afterwards brought on the sale deed, the Judge decreed against the other sharers, but dismissed it as regards the respondents for the reasons set forth in his decision.

A special appeal was admitted to try, whether Kurum Beebee and Aymun Beebee had not given legal authority to Buksh Hoosein Khan to act for them under the power of attorney, dated the 11th October 1847, and whether the deed of sale as regards them is valid.

The Court observe that the invalidity of the deed of sale in the respondents' case has been ruled by the Judge, and the facts of the case, according to the Judge's finding, are not open to question in special appeal; but the certificate having brought under consideration the reasons in the judgment on which the facts were found, the Court are of opinion that they are wanting in point of clearness. In regard to the execution of the deed, the Judge finds that no proof had been adduced by plaintiffs; that the respondents had empowered Buksh Hoossein Khan to sign it for them, "however such may have been understood, he being her eldest son and the lumburdar of the mouzah," and some circumstances are noticed which, in the Judge's opinion, are against their having been a party to the sale. But there is another alleged fact of much importance to the proper decision of the case, viz., the execution and presentation of the *mookh-teeearnamah* for the registry of the sale. On this the Judge has observed, "the power of attorney, subsequently filed, is repudiated by her, and as it is dated 11th October 1847, some thirteen days after the execution of the deed of sale, it is insufficient to bind her to a previous signature." If the Judge intend by this that the *mookhteeearnamah* is *not proved*, the same should be clearly stated with the reasons of the finding, and some notice should be taken of the evidence to this point on the part of the plaintiffs. If, on the other hand, the Judge consider it genuine, the bearing and weight of the document, as presumptive evidence of the genuineness of the sale transaction, will require consideration. The Court accordingly annul the decision, and remand the case to the Judge, who will review his judgment in advertence to the foregoing remarks. Refund of the stamp will be allowed as usual in remanded cases.

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The 16th June, 1851.

Present : { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 22 OF 1851. { Special appeal from the decision of C.
 R. Tulloh, Esq., Judge of Mirzapore,
 dated 18th September 1850.

JUGGERNATH, (Plaintiff), Appellant,
 versus

MUSSUMAT SAHIB KHANUM, (Defendant), Respondent.

THE decision is in the volume of decisions for the month.

THE Judge observes "this being a new case for which I could find no precedent I admitted the appeal. I can trace no prece-

dent, but I am of opinion that the claim is not cognizable in the Civil Court. Construction 1301 refers only to decrees of the Civil Courts, a suit for the execution of a summary decree of the Collectorate will not, in my opinion, lie in the Civil Court."

The action was brought to try the title of the defendant to a house, which had been released on her objection from an attachment made by the Revenue Authorities in execution of a decree obtained by the plaintiff in a summary suit, and is not therefore identical, as the Judge supposes, with a suit for the execution of a summary award; but the Court are of opinion that the claim is not cognizable, although the grounds for this conclusion are different from those assumed by the Judge.

The cause of action is the impediment to the sale of the house offered by the defendant's objection, but the law has not vested the Revenue Authorities with the power of selling real property in execution of their summary awards other than that on which the arrear has accrued, the restriction on this point in Constructions 4 and 496 having been extended to the Revenue Courts by Act VIII. of 1835. The attachment having been made in contravention of this rule, no valid cause of action is left in the suit. The appeal is dismissed.

The 16th June, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 110 OF 1851. { *Special appeal from the decision of J.
 P. Gubbins, Esq., Judge of Dehlie,
 dated 26th August 1850.*

JYERAM, (*Defendant*), *Appellant*,

versus

KISHEN LALL, (*Plaintiff*), *Respondent.*

THE case will be found in the decisions of the month.

A special appeal was admitted to try, whether the Judge could proceed to dispose of the merits of the case without recording his decision on the plea of limitation.

It appears that on the first hearing of the appeal, the Judge overlooked the plea of limitation, and remanded the case to the Moonsiff for an irregularity, and on the revival of the appeal considered himself precluded from entertaining the plea, being of opinion that the appellant should have either appealed the omission to this Court, or have applied for a review of judgment on the point. It has however been ruled in the decision of the

30th August 1848, No. 117, that a special appeal will not lie from an order of remand, and the same rule is applicable to an intermediate application for a review of judgment. The Judge was therefore fully competent to rectify the omission on the renewal of the appeal, and it is essentially necessary to the integrity of his decision that the defect should be supplied. The decision is annulled, and the case is remanded for that purpose.

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The 16th June, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 66 OF 1851. { *Special appeal from the decision of C.*
 Allen, Esq., Judge of Furruckabad,
 dated 21st December 1849.

OOMED RAI, (*Plaintiff*), *Appellant,*

versus

HEERA LALL, RAM PERSHAD AND HUNWUNT SINGH, (*Defendants*),
Respondents.

THE particulars of this case are in the decisions of the month.

A special appeal was granted to try, whether, under the circumstances of the case, the Judge was right in rejecting the doctrine of the Moonsiff, that "heirs should pay their ancestor's debts before they alienated any ancestral property."

It appears that the heirs, after succeeding to the property on the death of their father, pledged a portion of it in 1842 for a debt owing by them to the respondents Heera Lall and Ram Pershad, and in the following year disposed of the remainder by private sale to Hunwunt Singh. The mortgagees afterwards obtained a decree, and bringing the property to sale in execution, purchased it themselves; Hunwunt Singh also obtained a decree on a suit brought by him to establish his purchase. In the mean time, appellant sued the heirs, in 1843, for a bond debt of their father's, and obtaining a decree, brought the same property again to sale, and purchased it himself, but being unable to obtain possession has brought this action.

The Court do not see any reason for interference in the Judge's decision. Collusion is not alleged, and it rested with the appellant to prosecute his claim against the heirs of his debtor in proper time. He failed to do so, and it would be too much to affirm, that the fact of a simple bond debt, unaccompanied by any pledge, is in itself sufficient to tie up the hands of the suc-

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Present : { A. W. BEGBIE, *Judge,*
S. S. BROWN, *Offg. Judge.*

CASE No. 18 of 1851. { *Special appeal from the decision of H. W. Deane, Esq., Officiating Judge of Meerut, dated 7th May 1849.*

AMANUT ALI AND OTHERS, (Defendants), Appellants,
versus

LOOTF ALI AND OTHERS, (Plaintiffs), Respondents.

THE particulars of this case are given in the printed decisions of the month.

The suit was brought for possession and division, and registry as sharers in one-eighth of a mouzah which had been assigned for the support of a shrine, with *mesne* profits, and for a proportionate share in the shrine offerings. The claim also included a house alleged to have been acquired in private property by plaintiffs' ancestor, and was preferred by them as members of the body of *mootuwullees* attached to the shrine. Defendants pleaded that the suit was not consistent with the object of the endowment, of which defendants claimed to be the sole *mootuwullees*, and they denied the rest of the claim. The Principal Sudder Ameen in his decision recognized the purpose and character of the endowment, and refused to admit the full claim which would have created a private right in it in favor of the plaintiffs. He accordingly limited his decree to a recognition of their right to partake for the future as *mootuwullees* in the net income and offerings of the shrine to the extent of a one-eighth share. The claim to the house was dismissed, and the *mesne* profits were disallowed. In appeal the portion of the decision now under special appeal in this case was upheld by the Judge.

A special appeal was granted to try whether a claim to share in the profits of a village, or other property, the *whole* profits of which have been appropriated to religious purposes by the founder of the endowment, can be heard in the Civil Courts or not.

The Court observe that the particular point which the certificate was granted to try has not been pleaded by the special appellants, whose objections to the suit were based on the incompetency of the plaintiffs to lay claim to, or of the Courts to decree, a share in a religious endowment. In this respect some incongruity may be remarked in the object of the suit, and the decrees of the lower Courts, the Principal Sudder Ameen having decreed something different from the object of the suit, and the Judge, on the appeal of the defendants, having overlooked this defect in the decree, and upheld it as a decree for the suit on the property, but apart from these defects, which the certificate does not touch, the Court do not find in the decree of the Principal Sudder Ameen any thing alien to the purpose of the endowment, the management of such establishments being understood to consist in the appropriation of the receipts and offerings to the expenses of the religious service, and in the participation of the persons attached to the shrine in the surplus, according to their hereditary shares, which they would enjoy by virtue of their office as *mooturwullees*, and not as private persons. The appeal is therefore dismissed.

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The 16th June, 1851.

Present : { A. W. BEGGIE, Judge,
S. S. BROWN, Offg. Judge.

Case No. 12 of 1851. { *Special appeal from the decision of H.
W. Deane, Esq., Officiating Judge of
Meerut, dated 26th July 1849.*

AMANUT ALI AND OTHERS, (*Defendants*), *Appellants*,
versus

LOOTF ALI AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS appeal is connected with the case No. 13, and is an appeal from the order of the Judge allowing *mesne* profits to plaintiffs, in reversal of this part of the decision of the lower Court. The claim to *wasilat* was a consequent to the claim to a share in the endowment property preferred by the plaintiffs in their suit, but the Principal Sudder Ameen having refused to recognize a private right in endowment property, the *wasilat* claim necessarily fell to the ground. The Judge in allowing *wasilat* in appeal passed an order inconsistent with the finding of the Principal Sudder Ameen, which his decision in other respects upheld, and the appeal is therefore decreed with reversal of the Judge's decision, and with costs.

The 16th June, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 23 OF 1851. { Special appeal from the decision of C. C.
 Jackson, Esq., Officiating Judge of Meerut,
 dated 27th September 1850.

KHYRATEE RAM AND OTHERS, (*Defendants*), *Appellants*,
versus

MUSSUMAT SEETOO AND OTHERS, (*Plaintiffs*), *Respondents*.

THE decision of the Judge is in the volume of decisions for the month.

The suit was brought for the redemption of a mortgage. The defendants, amongst other pleas, objected that a balance of principal and interest still remained due to him in the mortgage transaction, besides other sums due on bonds, the liquidation of which was a condition of the mortgage contract.

The Moonsiff finding that the amount deposited in Court fell short of the principal still due, exclusive of an item of Rs. 285 for interest, followed the rule of practice laid down for such cases in the precedents quoted by him, and dismissed the suit, adding, that under these circumstances, it would not be necessary to enter upon the other items. On appeal from the plaintiffs, the Judge permitted them to pay into Court the balance of the principal, and without advertng to the unsatisfied item of interest, decreed the suit. It was further declared that the mortgagee was not responsible for other debts asserted to have occurred subsequently.

A special appeal was admitted to try the correctness of the Moonsiff's and Judge's finding on the points of, 1st, whether the Moonsiff had acted in conformity with law in omitting to decide the pleas of the defendants in regard to the *ikrarnamah* and bonds, which it is urged should be liquidated before the release of the estate; and 2nd, whether the Judge has acted according to law and precedent in receiving the balance of Rs. 25, and declaring the estate liable to redemption.

The course to be pursued by the Courts in a suit for redemption, when a balance is found to be still due, has been laid down in many precedents, of which it will be sufficient to cite the latest, 30th May 1850, No. 156, and it consists in dismissing the suit at once on *prima facie* evidence being found to the fact of the mortgagers not being in a position to sue in consequence of such balance. This course was properly taken by the Moon-

siff, who left all accounts and claims between the parties to future adjustment. In entering into the account and decreeing the suit, the Judge has overlooked the material point of the interest claim, and has decided another, viz., the non-liability of the mortgage for the other claims, which, if entertained at all in the suit, should have been heard and decided in the Court of first instance. The Court accordingly annul the decision, and remand the case for retrial with advertence to the foregoing observations. The stamp will be refunded, and the costs charged, as usual.

The 16th June, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 24 OF 1851. { *Special appeal from the decision of C. C. Jackson, Esq., Officiating Judge of Meerut, dated 27th September 1850.*

KHYRATEE RAM AND OTHERS, (*Defendants*), *Appellants,*
versus

MUSSUMAT SEETOO AND OTHERS, (*Plaintiffs*), *Respondents.*

THE circumstances of this appeal are identical with those of the case No. 23, disposed of to-day, and the order of remand is the same.

The 17th June, 1851.

Present : A. W. BEGBIE, *Judge.*

CASE No. 72 OF 1851. { *Special appeal from the decision of C. Allen, Esq., Judge of Furruckabad, dated 29th August 1850.*

GUNESH RAI AND MUNEE RAM, (*Plaintiffs*), *Appellants,*
versus

DOWLUT AND OTHERS, (*Defendants*), *Respondents.*

FOR the Judge's report of this case see pages 176 and 177 of the printed decisions for zillah Furruckabad for the past year.

A special appeal was admitted "to try whether the appeal preferred to the Judge by the respondent, Dowlut, from the decision of the Moonsiff, ought not to have been rejected as inadmissible, in consequence of its not having been preferred within

the prescribed period, and no special cause for the delay having been pleaded by the respondent in his petition of appeal or admitted as sufficient by the Judge."

Two of the respondents, viz., Dowlut and Mussumat Joommun, appeared in person to defend this appeal, and the record of the case being now before the Court, I observe that the irregularity noticed in the certificate of special appeal is in a great measure ascribable to the mode of proceeding adopted by the Judge, by which the respondents were misled. The decision of the Moonsiff was passed on the 19th October 1849; on the 15th November, the defendant, Dowlut, preferred an appeal to the Judge in *formâ pauperis*, and on the 4th January 1850, the record was perused by the Judge, and an order passed by him under Section 18, Regulation XXVIII. of 1814, conditionally admitting the appeal of Dowlut in *formâ pauperis*. The case was then referred to the Principal Sudder Ameen, with directions to enquire into the fact of pauperism; on the 6th February 1850, the Principal Sudder Ameen decided, that the defendant's allegation of pauperism was not proved, and returned the proceedings to the Judge. On the 8th February, the Judge ordered, that the case should be postponed till the period of appeal from the Principal Sudder Ameen's order should elapse, and that in the event of no appeal being preferred by that time, the case should be again brought forward. On the 2nd March, the Judge recorded a proceeding to the effect that as the defendant, Dowlut's, qualification to appeal in *formâ pauperis* had not been recognized, the appeal be struck off the file. On the same date, the Judge, in his separate *roobakaree*, confirming the order of the Principal Sudder Ameen disallowing the appellant's pauperism, passed an order, that the appellant *was at liberty to present an appeal, in the ordinary manner, within ten days from that date*. On the 5th March, accordingly, the defendant Dowlut presented an appeal on *stamp paper*, in which he recited the proceedings as above narrated, but did not *specially* urge them as a plea for not preferring his appeal within the prescribed period, and the Judge, without recording any reason for doing so, admitted the appeal, and disposed of the case on the 29th August last.

The Court observe that the Judge's order of the 2nd March 1850, directing the defendant Dowlut to prefer an appeal in the ordinary manner within ten days, was irregular and unauthorized by any law or rule of practice. He should have contented himself with dismissing the petitioner's application to sue in *formâ pauperis*, and with intimation to him that he was at liberty to prefer his appeal agreeably to the provisions of Clause 4, Section 12, Regulation XXVIII. of 1814, stating his reasons

for not having appealed within the period prescribed by the law. The Judge seems to have considered it a matter of right, that on Dowlut's application to appeal in *formd pauperis* being dismissed, he should be allowed to appeal in the ordinary manner, and that no necessity existed for recording an opinion as to the sufficiency of the appellant's excuses for exceeding the period fixed by law for appeals. But the Court cannot recognize any such right. It may, on the contrary, reasonably admit of question, whether a party, who has failed in his attempt to prosecute an appeal in *formd pauperis*, has not thereby furnished a rather strong argument *against* the subsequent admission of an appeal in the ordinary mode. Clause 4, Section 12 of Regulation XXVIII. of 1814 by no means contemplates the *unconditional* admission of an appeal after the failure of a petitioner to establish his right to appeal in *formd pauperis*. It has been ruled* by the Sudder Dewanny Adawlut that "a mere applica-

* Sudder Dewanny Adawlut Select Reports, 30th January 1838.

tion for permission to sue in *formd pauperis* is not a preferring of a claim within the meaning of the rule of limitation laid down by Section 14, Regulation III. of 1793," and on the same principle an unsuccessful attempt to appeal in *formd pauperis* does not necessarily exempt the petitioner from the operation of the law of limitation in regard to appeals, although the Appellate Court may exercise its discretion in admitting or rejecting the appeal. The absence of any such discretionary order in the present case vitiates the proceedings, and calls for correction. The Judge's decision is accordingly annulled, and the case remanded for retrial with reference to the foregoing observations.

— o o o o —
The 18th June, 1851.

Present: H. W. DEANE, Judge.

CASE No. 158 OF 1850. { *Regular appeal from the decision of Yar Ali Khan, Principal Sudder Ameen of Jounpore, dated 30th May 1850.*

RAMPUL, (*Defendant*), *Appellant*,
versus

HAJEE IMAM BUKSH, (*Plaintiff*), *Respondent*.

THIS suit is brought to erase from the Revenue Record the name of Mohumed Shakur, as proprietor of a four-anna share in the talooqua of Salarpore, and to substitute in place of it the name of the plaintiff, by altering the order of the Collector,

dated 12th April 1849, and by giving effect to previous orders, dated 30th November 1847; also to recover *wasildt* from the beginning of 1255 Fuslee to the middle of 1256 Fuslee, amounting to Rs. 6,297-15.

The plaint sets forth, that the entire talooqua of Salarpore became the property of Mohumed Zuma on the 2nd August 1820, on suit brought by him against Government; that Mohumed Shakur sued for proprietary right in one-half of the talooqua, associating with him Mohumed Heiat, and obtained a decree to the extent sued for on 30th June 1823; that subsequent differences arose between Mohumed Shakur and Mohumed Heiat, which resulted in Mohumed Heiat's obtaining a decree in April 1824, for a four-anna share out of the eight-anna share decreed to Mohumed Shakur. From these decisions Mohumed Zuma appealed, and the appeal cause had proceeded as far as service of notice on the other party, when Mohumed Shakur, with the consent of Mohumed Heiat, adjusted the matter in dispute by a *soolehnamah*, in conformity to which Mohumed Shakur waived his rights in the talooqua, in consideration of receiving from Mohumed Zuma Rs. 140 per annum. The Appellate Court, on the 15th March 1826, decided according to the terms of the *soolehnamah*, and on the 24th August 1826, an order having been passed to erase the name of Mohumed Shakur, Mohumed Zuma became the recognized owner of the entire property. In the mean time, however, subsequently to the passing of the decree in favor of Mohumed Shakur and Mohumed Heiat, but before the acceptance of the Court of the *soolehnamah*, Mohumed Shakur and Mohumed Heiat had made transfers of the interests assigned to them, and Mohumed Zuma had no opportunity of setting these proceedings aside, and of obtaining the record of his name in the Collector's books as sole proprietor, before the talooqua fell into balance, and was let in farm. The farmer was the present plaintiff, and in consequence of this transfer in farm, Mohumed Shakur and Mohumed Heiat continued to be recorded. The right in the talooqua of Mohumed Zuma was afterwards sold by order of Court in execution of a decree had against him by Luchmee Mull, and on the 9th May 1837, the plaintiff purchased this right in the name of Soojad Ali. In the beginning of 1255 Fuslee, the farming arrangements were finally set aside, and the restoration of the old proprietors was ordered; claims were set up by the heirs of Mohumed Zuma, whose rights had been disposed of by sale, and by the representatives of Mohumed Shakur, who had exchanged his interest in the talooqua for a money payment, and conflicting orders having been passed by the Collector, the plaintiff has recourse to a Civil action, in order that his sole title be judi-

cially declared in virtue of his purchase of the rights of Mohumed Zuma, who, at the time of the purchase, was sole proprietor.

There were several classes of defendants in the lower Court: of these one individual only, Rampul, appeals. He is of the class of transferees from the old zemindars, and he admits possession for the period during which the plaintiff lays claim to *wasilat*. His defence is therefore valid or not, according as the title of those from whom he derives may be found to be valid or not.

The Principal Sudder Ameen decreed in favor of the plaintiff. He has remarked that copies of documents filed by the plaintiff clearly establish the fact that Mohumed Shakur, when Mohumed Zuma appealed against the decree which the former had obtained, consented to receive a money allowance from Mohumed Zuma in lieu of his right as a sharer in the estate; and that the *ishtar* and *sunnud* of sale show, as clearly, that the entire interests of Mohumed Zuma passed away under the sale effected in 1837 at the instance of Luchmee Mull. The plaintiff having bought those interests in the name of Soojad Ali, as is admitted by Soojad Ali, is consequently sole owner. In regard to *wasilat*, the Principal Sudder Ameen held it to be made out by the putwarree's papers and other evidence, that the amount claimed had been received by the defendants, who had established themselves in possession without a just title.

There is no tenable ground of appeal from this decision; no question arises in respect to the interest decreed to Mohumed Heiat; no question arises in respect to the plaintiff being the real purchaser in the name of Soojad Ali. There is irrefragable evidence that on the 15th March 1826, the appeal cause of Mohumed Zuma, *versus* Mohumed Shakur, was decided conformably to a *soolehnamah*, by which Mohumed Shakur accepted a compensation in money for the right previously adjudged to him. The *ishtar* of sale, dated 1st April 1837, notifies that the entire right of Mohumed Zuma will be brought to sale on a day therein mentioned. It is an argument of no force, that the name of Mohumed Shakur continued to be recorded, notwithstanding the decision by *soolehnamah*, in the revenue register; for no claim can be made, in virtue of that record, to rights which are shown to have been formally abandoned. Mohumed Zuma was sole proprietor when his rights were sold, and the plaintiff, as purchaser, stands in his place. The appeal is dismissed.

The 21st June, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 56 OF 1850. { *Regular appeal from the decision of
Qazie Yar Ali Khan, Principal Sud-
der Ameen of Jounpore, dated 29th
December 1849.*

RAJAH ISHREEPERSHAD NARAIN SINGH, (*Defendant*),
Appellant,

versus

RAI TEK LALL, HEIR OF RAI GIRODUR LALL, (*Plaintiff*)
Respondent.

PLAINTIFF brings his action to obtain possession of talooqua Dunwar Rao, under a deed of assignment of the proceeds from the former proprietors, in liquidation of a debt contracted by them on the 31st August 1832, against the sale purchaser, Rajah Ishreepershad Narain Singh. Estimate of suit at three years jumma, Rs. 82,920-4-6.

This case has been twice before the Court, and the particulars of the claim are set forth in the Court's decision of the 11th January 1848, when a nonsuit was declared. The plaintiff has now renewed his suit in the form indicated in the order of nonsuit.

The defendant first raised an objection to the valuation, which he urged should have followed the rule in Clause 4, Note to Article 8, Schedule B. Regulation X. of 1829, and Construction 1101, and have been estimated at the value of the thing sued for, and not on the jumma. It was further objected that the suit was barred by limitation. On the merits defendant pleaded that the party Sheoraj Singh, who gave the deed of assignment, was only owner of a sixth of the property, and was not competent to pledge the whole, whereas defendant had acquired by his sale purchase the rights of all the sharers; that although the claim was put forth as one of conditional mortgage, the process prescribed in Section 8, Regulation XVII. of 1806, had not been observed, and that no objection had been advanced by the plaintiff at the time of sale, which, if the deed and claim were genuine, would certainly have been made.

The Principal Sudder Ameen lays down three points as necessary to be determined, viz. the genuineness of the transaction, the validity of the assignment of the whole property by the owner of a sixth share of it, and the position held by the Rajah as sole purchaser, with his liability to the claim as regards the property. The first point is decided on the evidence in favor

of the genuineness of the deed. With regard to the second point, the Principal Sudder Ameen finds, that under a *soolekha-mah* filed prior to this transaction by the sharers in a suit before the Court, and enforced by decree, Sheoraj Singh had been put in possession of the whole property, and as the debt had been incurred in order to save it from sale for arrears of revenue the transaction was held to be valid and binding against the other sharers. Thirdly, the property having thus been pledged for the satisfaction of the demand, its transfer to the Rajah did not exempt it from its liabilities : possession was accordingly decreed.

The appellant has now brought several technical reasons against the suit, and pleads the omission by the lower Court of any decision on the objections then raised by him. It appears that these objections were noticed in the interlocutory proceeding of that Court, and the Court is at a loss to understand why they were not disposed of. The limitation plea has not been revived, and the only renewed objections which call for notice are first, that of the valuation, and in this respect the respondent has undoubtedly erred in assuming a wrong principle of estimate, the decision of the Court of the 20th August 1849, No. 162, having established the rule that a suit for the possession of mortgaged property must bear the estimated value of the thing sued for, and not the jumma valuation, but the same decision rules, that a wrong principle of estimate does not necessitate a nonsuit, unless the error of valuation be a self-evident infraction of the Clauses of the Note to Article 8, Clause 4 excepted, or if coming under Clause 4, unless the undervaluation be proved on objection duly urged by the opposite party. In this case no proof of undervaluation has been adduced, and the objection is therefore overruled. The second objection is founded on the omission from the plaint of the details of the calculation of interest, which it is urged renders the plaint and decree imperfect, but the object of the suit being to obtain possession in pursuance of the terms of the deed, any further detail in the plaint was not called for, nor was it the business of the Court at the present stage to settle accounts between the parties.

With regard to the merits the Court sees no reason to dissent from the conclusion of the Principal Sudder Ameen. The deed is proved, and it is clearly shown that Sheoraj Singh authorized his sons, who were associated with him in it, to execute it in their joint names at Benares, and that it was registered afterwards at Sheoraj Singh's application at Jounpore. This circumstance, which has been adduced by the appellant as tending to throw doubt on the document, serves rather to confirm it. The appellant has further referred to a clause in the *soolekha-*

mah, in which Sheoraj Singh engages, in general terms, not to alienate the property, but it has already been shown that the debt was incurred to save it from permanent alienation, and the exceptional circumstances sufficiently justify the transaction. The pledge was on the property, and it has been repeatedly ruled that the transfer of the proprietary right, by public sale, in satisfaction of decrees, does not affect any prior mortgage lien.

The appeal is dismissed, with costs.

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The 19th June, 1851.

Present: A. W. BEGBIE, Judge.

CASE NO. 5 OF 1851. { *Regular appeal from the decision of Moul-
vee Syed Mohumed Villayet Ali Khan,
Principal Sudder Ameen of Allahabad,
dated 11th December 1850.*

MUSSUMAT GOOLAB KOONWUR, (*Plaintiff*), Appellant,

versus

MOHUN LALL AND SHEIKH-ool-ISLAM, (*Defendants*), Respondents.

THE plaintiff's case is thus stated. There had been frequent disputes on pecuniary matters between her late husband, Sheo Dutt Singh, and one Bunsee Dhur, a *muhajun*, resulting in legal proceedings. At length, by a decision of the Sudder Court, the sum of Rs. 14,685-10 was adjudged to be due to her husband from Bunsee Dhur, as principal, with the addition of Rs. 11,346-4-9, as interest, which sums were paid into the Court's Treasury by Bunsee Dhur, on the 9th March, and 6th October 1847. The defendant, Sheikh-ool-Islam, (who had been the *mookhtear* of Sheo Dutt Singh), is now charged by the plaintiff with having drawn the former of the abovenamed sums from the Sudder Treasury, and paid it over to the other defendant, Mohun Lall, on the 13th May 1847, without the knowledge or consent of Sheo Dutt: and she, further, declares, that the defendant, Mohun Lall, has rendered no account to her of his pecuniary transactions with her husband. It is also alleged that Mohun Lall, who held a mortgage of Sheo Dutt Singh's landed property; and was his *kuseelkar*, or responsible agent, subsequently contrived to get Sheo Dutt Singh to execute a bond for Rs. 19,000, for which the latter received no consideration, and without coming to any previous settlement of accounts, plaintiff's husband died on the 28th Asar 1256 Fuslee, (3rd July 1850); on which she applied to have her infant son's estate placed under the management of the Court of Wards, and, in retaliation thereof,

the defendant, Mohun Lall, instituted a suit against her, on the abovementioned fraudulent bond for Rs. 19,000. The object of the plaintiff's present suit is, therefore, to recover, from the two defendants, the sum of Rs. 14,865-10, thus fraudulently appropriated by them, with interest thereon, amounting to Rs. 5,227-11-9.

The defendant, Mohun Lall, in reply, declares, that not a single rupee is due from him to the estate of plaintiff's late husband. He states that, independently of a mortgage held by him on the landed property of the deceased, for Rs. 40,000, there had been a settlement of other accounts between them, when a balance of Rs. 23,781 was admitted by Sheo Dutt Singh to be due to defendant, who, at his earnest entreaty, relinquished Rs. 4,781-14-8 of the debt thus acknowledged, and took a bond for the balance or Rs. 19,000, bearing date 20th September 1848. The defendant further states that the sum of Rs. 14,865-10, now claimed by the plaintiff, had been credited to Sheo Dutt's account, in striking the balance, for which the bond of Rs. 19,000 was given.

The defendant, Sheikh-ool-Islam, replies, that the money in dispute was drawn by him from the Sudder Court's Treasury, and paid to the defendant, Mohun Lall, with the full knowledge and consent of his late employer, Sheo Dutt Singh.

The Principal Sudder Ameen dismissed the plaintiff's claim, observing, that the disputed item had been expressly allowed in the bond for Rs. 19,000, executed by Sheo Dutt Singh, which bond had been clearly proved by the attesting witnesses: that it was highly improbable if Sheo Dutt Singh had been defrauded by the defendants in the manner described by the plaintiff, he should never have complained against them in any Court, but still continued to employ Sheikh-ool-Islam as his *mookhtear*, and permit him to draw money for him from the Civil Courts: the contents of the bond, the Principal Sudder Ameen remarks, disprove the statement contained in the petition of plaint; he discredits the evidence brought by the plaintiff to prove that her husband's mind was in a disturbed state when he executed the bond, and that the defendant, Sheikh-ool-Islam, acted without authority from his principal. In conclusion, the Principal Sudder Ameen, in justification of his dismissal of the plaintiff's suit, refers to the separate decree passed by him, under date 25th September last, in favor of the defendant Mohun Lall, in the suit brought by him on this very bond.

After perusing the record of this case, I entertain not the slightest doubt of the entire justice of the Principal Sudder Ameen's decision. The reasons given by him for dismissing the plaintiff's claim are unanswerable. The execution of the bond

for Rs. 19,000, is clearly proved by most respectable witnesses, from whose evidence it is apparent that the deed was carefully read over and explained to Sheo Dutt before he signed it, and that he fully understood and admitted its contents. The plaintiff, aware that if the due execution of the bond were proved, it would convict her of falsehood, has endeavored to shew that her husband was not a free agent at the time he signed it; but in this attempt she has altogether failed; as, also, in that to prove that the defendant, Sheikh-ool-Islam, acted without his employer's authority in drawing out the money from the Sudder Court's Treasury, and paying it to Mohun Lall. There would be very little use in executing bonds and other instruments if their obligations are to be set aside on such worthless oral testimony as has been got up by the plaintiff and her advisers in the present case; her three principal witnesses are servants or retainers of her late husband, who have evidently been tutored for the purpose. I dismiss the appeal, with costs.

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The 23rd June, 1851.

Present : { A. W. BEGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

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CASE No. 63 OF 1851. { *Special appeal from the decision of Moul-
 vee Mohamed Hoossein Khan, Principal
 Sudder Ameen of Bareilly, dated 23rd
 November 1850.*

KHEMKURUN SINGH AND OTHERS, (*Defendants*), *Appellants,*
 versus

MOOHKUM SINGH AND OTHERS, (*Plaintiffs*), *Respondents.*

THE plaintiffs in this case sued to obtain possession of 1 biswah 11½ biswansees of mouzah Dubharee, and to set aside a deed of sale executed in favor of the defendants Khemkurun and others. They stated that Pudum Singh, Lahoree Singh and Maha Singh, the former proprietors of the share in dispute, were their near relatives, that their rights and interests therein had been exposed to sale in execution of a decree obtained by Hursookh Rai and Toolsee Ram, defendants, who themselves purchased the same, and had subsequently transferred the property to the other defendants, Khemkurun and others, by private sale for the sum of Rs. 400, although, in the deed of sale, the price was falsely specified to be Rs. 700: that the application of Khemkurun and his co-purchasers to effect a mutation

of names in the Collector's *malgozaree* register had been unsuccessful, and had been protested against, at the time, by the plaintiff Moohkum Singh; that Khemkurun and his party had now, in collusion with the auction purchasers, Toolsee Ram and Hursookh Ram, instituted a suit to obtain possession of the share, that they (plaintiffs) had a preferential claim to purchase the property, as the original proprietors, Pudum Singh, Lahoree Singh and Maha Singh, were more nearly related to them than to the defendants Khemkurun, &c., that they were ready to pay the *real* amount of purchase money, viz., Rs. 400, and, finally, that, according to the Hindoo and Mohomedan Law of præemption, and the Rules and Regulations of Government in respect to the Revenue Settlement of villages, their title was indisputable.

The defendants, Khemkurun Singh and others, in reply, denied the existence of any such right as that claimed by the plaintiffs: they averred that their own claim was far superior, inasmuch as they were already hereditary proprietors of 15 biswahs and 18½ biswansees of the village, and the plaintiffs possessed only two and a half biswahs; that defendant's father, Rajah Ram, was the proprietor of the entire mouzah; that after the auction sale of the share in dispute, and its purchase by persons altogether unconnected with the village, the right of præemption had ceased to exist; if plaintiffs considered themselves entitled to claim præemption, they should have done so at the time of the auction sale; that according to the *thoke puttee*, coparceners were entitled to purchase by private sale, and they, defendants, were proprietors of the greater part of the village. They denied the alleged near relationship between plaintiffs and the original proprietors, and, in conclusion, they declared, that they did actually pay down in cash the sum of Rs. 700, as the purchase money, and not Rs. 400, as stated by plaintiffs.

The Moonsiff passed a decision to the effect that, according to the provisions of the Settlement, both plaintiffs and defendants (Khemkurun, &c.), were entitled to claim a right of præemption, in proportion to the extent of interest held by them in the village, respectively. He, accordingly, gave a decree in favor of plaintiffs for 4 biswansees, 4 kuchwansees and 13 tiswansees, &c., &c., dismissing the remainder of their claim. This decision was upheld in appeal by the Principal Sudder Ameen, who records his opinion that the said decision was very proper, and exceedingly reasonable (*ain moonasib aur nihayut maqool*).

A special appeal was admitted to determine, "whether the lower Courts were justified by law or usage in giving a decree in part of plaintiff's claim by right of præemption, as recognized by the act of Settlement."

The Court can by no means subscribe to the unqualified commendation bestowed by the Principal Sudder Ameen on the decision of the Moonsiff. On the contrary, they regard that judgment as altogether erroneous and arbitrary, and based on no sound principles. There can be no such thing as a *divided* right of præemption. The *entire* and *unmutilated* title must vest in one party, or the other. There is nothing to be found in the *thoke puttee*, which justifies the distribution of the land in dispute between the contending parties. The terms are as follows. "If any coparcener shall wish to transfer his share, then the nearest of kin to him in that share shall have a preferential right of purchase; and in the event of his declining to purchase, then the other sharers shall be at liberty to purchase it: if they also decline, then he may sell it to whomsoever he chooses." Whatever claim, by right of præemption, may, possibly, have once been possessed by the plaintiffs, has clearly been forfeited for the time, by their own laches; according to paragraph 8 of the Circular Order of this Court under date——, the plaintiffs should have asserted their right of præemption, at the time the auction sale of the rights and interests of the original proprietors, Pudum Singh, Lahoree Singh and Maha Singh, was effected. Having neglected to avail themselves of that, their only *legal* opportunity, they cannot now come forward to renew the claim on the ground of *proximity of blood*. All that now remains to them is the right, in common with other coparceners, to purchase, in preference to an entire stranger, should this property again come into the market. They have no *preferential* claim, in comparison with that of the defendants, Khemkurun, and others, who are themselves likewise original coparceners in the village. The Court accordingly amend the decisions of the lower Courts by dismissing the *entire* claim of the plaintiffs, with costs, as usual.



The 23rd June, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 62 OF 1851. { *Special appeal from the decision of Moulvee
 Mohumed Hoossein Khan, Principal Sud-
 der Ameen of Bareilly, dated 23rd
 November 1850.*

KHEMKURUN SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

TOOLSEE RAM, MOOHKUM SINGH, AND OTHERS, (*Defendants*),
Respondents.

THIS suit is connected with the preceding one this day dis-
 posed of, being, in fact, a counter claim, preferred to the same
 property, by the plaintiffs, Khemkurun and others, defendants
 in the other case, on the deed of sale, executed in their favor by
 Toolsee Ram and Hursookh Rai the auction purchasers. The
 decision of course is dependant on that in case No. 63, and
 that having been determined against Moohkum Singh and his
 party, who claimed the right of præemption, a decree in favor
 of the plaintiffs and appellants in this case must necessarily
 follow. The decisions of the lower Courts are accordingly
 amended, and a decree *in full* passed in favor of plaintiffs.

The 23rd June, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 212 OF 1849. { *Regular appeal from the decision of
 Mohumed Hussun Khan, Principal
 Sudder Ameen of Mynpoorie, dated
 8th August 1849.*

JOHN WILLIAM BIRCH, (*Plaintiff*), *Appellant*,
versus

HUGH ATKINS REID, JAMES GEORGE BIRCH, HUR PERSHAD,
 BUKHUT MULL AND BIRJ LALL, (*Defendants*), *Respondents.*

THE plaintiff sues for the abolition of the office of guardian
 over him, hitherto exercised by the defendant Reid, to be put
 in possession, under the terms of his father's will, of certain
 landed property in zillah Mynpoorie, including two mouzahs by
 name Allahabad and Suleempore, at present held in mortgage

by the defendants, Bukhut Mull and Birj Lall, to recover a sum of Rs. 1,281-3 in deposit in Court, as recovered in a suit, wherein the decision of the Court below was reversed, and to get *vasilat* from date of suit to date of getting possession.

The claim is valued at Rs. 14,444-6.

The plaintiff and his elder brother, James George Birch, are sons of the late Stephen Birch, of the Mahratta Pension Establishment. By his Will, dated 18th March 1841, Stephen Birch appointed his sons-in-law, James Baldock and Hugh Atkins Reid, both of the Bengal Army, his executors. Stephen Birch died on the 1st August 1844. Baldock went to England, and the guardianship of the two sons of Stephen Birch, who were minors at the time of their father's death, devolved on the defendant Reid. The plaintiff states that, on the coming of age of his elder brother, the latter's name was recorded in the Collector's register, and still stands there in respect of property which belongs to the plaintiff. A division of the property between the brothers took place. The guardian Reid borrowed, on the 27th July 1846, Rs. 5,000 from Bukhut Mull and Birj Lall, on the mortgage of two villages by name Allahabad and Suleempore, which, under the division adverted to, had fallen to the plaintiff's share: Reid also took up, as guardian, other sums from the same persons, at one time Rs. 2,000, at another Rs. 3,500, the repayment of which he secured to them by bond. Bukhut Mull and Birj Lall sued Reid on the mortgage deed, making this plaintiff, then a minor, a defendant likewise, and, on the 14th December 1848, got a decree for possession of the mortgaged property. The plaintiff disavows all liability to the mortgagees under the act of Reid, and contends that he has nothing to do with the satisfaction of the claim of Bukhut Mull and Birj Lall. He came of age on 23rd January 1849, and demands to be relieved from a state of tutelage.

The defendant, James George Birch, admits that two mouzahs, Akberpore and Secunderpore, at present registered in his name, are his brother's property, and avers that his brother, though not the recorded proprietor, is in possession. He is willing to make the requisite transfer whenever called upon to do so.

Reid the guardian has demised since the institution of the suit. Hursershah, *surburakar*, made a defendant after Reid's death, pleads that he has no interest in the result of the action.

Bukhut Mull and Brij Lall, mortgagees, urge that the plaintiff cannot have possession of Allahabad and Sulcempore till he has redeemed the mortgage. They hold, it is contended, under the decree in their favor of December 1848, on which occasion Reid and the plaintiff were joint defendants. In regard to the further sums, which are stated by the plaintiff to have been advanc-

ed by the mortgagees to Reid, in excess of the sums advanced on mortgage, the defendants, Bukhut Mull and Birj Lall, assert, that they are covered by bond, and have not yet been sued for. The whole of the advances are declared to have been made for the purpose of enabling the guardian to carry on indigo works on the estate, and for expenses therewith connected, the bonds stating expressly that the money was borrowed with these objects. The mortgagees also state that they have in their possession several letters written by the plaintiff, which prove his acquiescence in the transaction. The suit is further said to be barred under Section 10, Regulation II. of 1803, the point at issue having been already tried in the suit, in which these defendants obtained a decree for possession of the mortgaged mouzahs.

The Principal Sudder Ameen observes that the hereditary right of the plaintiff is nowhere disputed, and as the certificate put in shows the plaintiff to have reached twenty-one years of age, on the 23rd January 1849, he is entitled to hold himself and his property at his own disposal. The plaintiff, when sued jointly with Reid and Bukhut Mull and Birj Lall, made the same objections which he now makes, and they were overruled. The money stated to be in deposit in Court is correctly so stated, and the plaintiff is entitled to it. The Principal Sudder Ameen recognized the full claim of the plaintiff to the things sued for, with the exception of Suleempore and Allahabad, and as these latter are held by Bukhut Mull and Birj Lall, as mortgagees, under decree in their favor, the lower Court declared that the mortgage must be redeemed before the plaintiff can enter on possession of them.

The appellant pleads that Reid had no authority to dispose of his property in mortgage; that he has derived no benefit from the arrangement, and that his father left much property, wholly unencumbered. In regard to the decision of December 1848, adverted to as sanctioning this mortgage, the appellant observes that Reid filed a confession of judgment, and that as the suit was brought against him during his minority, no order passed could affect him, a minor not being legally impleadable.

The Court at large are of opinion that the judgment of the Principal Sudder Ameen cannot be disturbed. There is no doubt that a guardian is bound to account to his ward for his management of the latter's estate, and it is reasonable to presume that, but for the death of the defendant Reid, such an account would have been furnished on this occasion. The documentary proof filed by the parties in this case is meagre, the plaintiff having put in a baptismal register, and a *roobakaree* of the lower Court, dated 22nd July 1848, having reference to the plaintiff's minority, and nothing more in the shape of docu-

mentary evidence, while, on the other hand, the defendants, Bukhut Mull and Birj Lall, have filed only a copy of the decree of December 1848. There is nothing therefore to show that Reid did not borrow the money for the purposes specified by the mortgagees; and unless the plaintiff can refute that assertion, and can make it appear that Reid and the mortgagees acted in collusion to the detriment of the plaintiff's interest, the plaintiff is legally bound by the act of his guardian. For these reasons, the appeal is dismissed.

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The 23rd June, 1851.

Present : S. S. BROWN, Offg. Judge.

Case No. 32 of 1850. { *Regular appeal from the decision of Moul-
vee Abdool Azeez, Principal Sudder
Ameen of Goruckpore, dated 23rd
November 1839.*

MUSSUMAT BUTASEE, (WIDOW OF RAM DASS), AND BABOO LUCHMUN
DASS, (*Plaintiffs*), *Appellants*,

versus

MUSSUMAT MOHUMDEE JAN, MUNOO LALL AND NUBEE BUKSH,
(*Defendants*), *Respondents*.

THIS suit has been brought for the possession of mouzah Dehghat and four other *lakhiraj* mouzahs under a mortgage deed of the 5th November 1836, executed by Zeenut Beebee and Nubee Buksh, widow and heir of Mohamed Buksh, for a debt of Rs. 7,700.

After details of the particulars of the mortgage, the plaint proceeds to state that Zeenut Beebee evaded its performance, and lodged a complaint in the Magistrate's Court denying its execution. The charge was thrown out, and Zeenut Beebee afterwards executed a written acknowledgment of the transaction, and gave possession of the property pledged, which was held by the mortgagee for two years. Zeenut Beebee afterwards induced Mohumdee Jân to institute a collusive suit for a thirteen-anna share in the mouzahs, which was decreed, and plaintiffs were dispossessed. The share of Zeenut Beebee remaining was afterwards sold in satisfaction of the costs of suit, and purchased by Munoo Lall, who, with Mohumdee Jân and Nubee Buksh, for themselves and as heirs of Zeenut Beebee, are made defendants in the suit.

Mussumat Mohumdee Jân made answer, denying the fact of her heirship to Zeenut Beebee, together with the mortgage deed, and plaintiff's statement of her collusion with Zeenut Beebee,

and pleaded that she had succeeded to her share of the property by right of inheritance. Munoo Lall, purchaser of Zeenut Beebee's interests, denied the mortgage transaction and deed. Nubee Buksh did not appear.

The Principal Sudder Ameen rejected both the mortgage deed and *ikrarnamah*, and dismissed the suit. He observed that the mortgage deed did not bear any signature of Zeenut Beebee, and that the seals of the two documents did not correspond; that Zeenut Beebee, although she was at Goruckpore at the time, and had attended at Court on another occasion to attest a *vakalutnamah*, did not attend in person at the registry of the deed, and that no *mookhteeearnamah* was forthcoming, authorizing Hyder Buksh, the person, who was said to have been present in her behalf, to act for her. It further appeared from the evidence that, on a complaint being lodged by Zeenut Beebee in the Magistrate's Court in the following year, charging the parties concerned in the registry of the deed with forgery and fraud, Hyder Buksh and his son Nubee Buksh absconded, and that Hyder Buksh's appearance in the registry transaction was in itself matter of suspicion, he being son of one Sheikh Chyn, who had shortly before been cast in a suit for the property, which had been long pending between him and Mohumed Buksh, husband of Zeenut Beebee, and Mohumdee Jân and Zeenut Beebee, heirs of Mohumed Buksh. Plaintiffs alleged that the debt was incurred for advance of funds for the prosecution of the suit; but if the statement were true, and the mortgage transaction genuine, Mohumdee Jân would have been a party to it, rather than a grandson of their adversary. With regard to the evidence, the Principal Sudder Ameen remarked that the credit of the two marginal witnesses to the mortgage deed was impaired by direct contradictions on a material point between their present depositions and a statement made by them in the Criminal Court in 1837. On that occasion, they did not deny that they were in the plaintiff's service, whereas they now depose that they were at that time in the employ of Zeenut Beebee, and their evidence was otherwise unsatisfactory. The evidence of the third witness carried no weight with it. The *ikrarnamah* remained to be considered. It had not been registered, nor was any mention made of it at the time, and the evidence of the two marginal witnesses was of no value, their testimony having been repeatedly rejected in other cases in which they had appeared.

From this decision, the plaintiffs appeal; but I see no reason to dissent from the judgment. The claim is brought against Mussumat Mohumdee Jân, on the alleged fact of the decree obtained by her in her suit with Zeenut Beebee having been a

collusive one, but of this no proof has been adduced, and the circumstances are wholly opposed to such a presumption, neither is her heirship, as the representative of the interests of Zeenut Beebee in the share purchased by Munoo Lall, in any way established. She must therefore be exempted from the claim. With regard to the share now held by Munoo Lall, some of the reasons in the judgment have been impugned by the appellants, who have endeavored to show, from their evidence, that so far from the previous litigation having bred lasting enmity between the members of the family, Zeenut Beebee had, in the year previous to the mortgage, associated Nubee Buksh with herself in her affairs; but if the interests of Nubee Buksh were identical with those of Zeenut Beebee at the time, and the transaction were a genuine one, they fail to explain why Nubee Buksh absconded with his father Hyder Buksh when charged by Zeenut Beebee with fraud. The Principal Sudder Ameen has entered fully into the evidence, and his conclusions from it appear just. Much suspicion attaches to the case, but the interests of Zeenut Beebee in the property have determined, and a full disclosure of the real facts could not be expected. It is sufficient that the documents are not safe, and that the evidence brought to support them is untrustworthy.

The decision is confirmed with costs. The appellants are chargeable with vakeel's fees of both parties of the respondents.

The 24th June, 1851.

Present : A. W. BEGBIE, Judge.

CASE NO. 38 OF 1851. { *Regular appeal from the decision of S. S. Brown, Esq., Judge of Agra, dated 27th December 1850.*

JOWAHIR SINGH, (*Defendant*), *Appellant*,
versus

CHEETUR MULL AND HUR BUKSH, (*Plaintiffs*), *Respondents*.

THIS case is reported at pages 96 to 98 of the printed decisions for Zillah Agra, for the month of December last, and as the circumstances are therein fully detailed, it is unnecessary to say any thing in addition thereto; I shall therefore confine myself to recording my reasons for upholding the decision of the Zillah Court.

From several circumstances specified in the printed report of the case, and developed in the proceedings, I was at first disposed to question the correctness of the conclusion arrived at by the Judge, as to the *prior* execution and genuineness of the plain-

tiffs' deed of sale. The addition of the name of a *fifth* witness to the deed, which was not in the copy originally drawn up by the Qazie, the palpable falsity of the evidence adduced by the plaintiffs, to prove that the defendant, Jowahir Singh, fraudulently prepared his own deed of sale, in the presence of strangers, in the public road, and in broad day-light, the denial of all knowledge of the plaintiffs' deed of sale by the chief witness thereto, Nund Lall, the neglect of the plaintiffs to have the transfer recorded in the Collector's Office, were all facts calculated to excite the suspicion that the plaintiff's deed of sale had been fraudulently antedated, with the view of setting aside that held by the appellant Jowahir Singh. This indeed is positively asserted by the appellant, in his *juwabdauee*, and to clear up this doubt, I sent for the *original* Qazie's book, containing the copy of the plaintiff's deed of sale, and the monthly abstract statement of deeds attested and registered, which the Qazies, according to the Circular Order of the 23rd November 1838, are bound to forward to the Judge. On a careful inspection of these documents (the appearance of which is open to no suspicion) I am perfectly satisfied that the plaintiffs' deed of sale *was* executed and registered by the Qazie, on the date which it bears, and that the statement of the defendant, as to its having been prepared at a date subsequent to that of his own deed, on an old sheet of stamp paper, is without foundation. This fact then, which is the point at issue between the parties, having been satisfactorily cleared up, I have no hesitation in affirming the decision of the Judge, and I dismiss the appeal, with costs.

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The 24th June, 1851.

Present : A. W. BEGBIE, Judge.

CASE NO. 39 OF 1851. { Regular appeal from the decision of S. S. Brown, Esq., Judge of Agra, dated 27th December 1850.

JOWAHIR SINGH, (Plaintiff), Appellant,
versus

JOGUL KISHORE AND OTHERS, (Defendants), Respondents.

SEE page 99 of the printed decisions, for Zillah Agra, for the month of December last.

The decision of this suit is necessarily dependent on the fate of cases Nos. 38 and 40, the suits being brought by Jowahir Singh, as the *purchaser* of the property, to redeem the mortgage

of 11½ biswahs therein held by the respondents, who are the plaintiffs in the foregoing two cases. As I have affirmed the decisions of the Zillah Judge, disallowing the appellant's title as *purchaser*, he, of course, has no right to redeem the property. The appeal is dismissed, with costs.

The 24th June, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 40 OF 1851. { *Regular appeal from the decision of
S. S. Brown, Esq., Judge of Agra,
dated 27th December 1850.*

JOWAHIR SINGH, (*Defendant*), *Appellant*,
versus

JOGUL KISHORE AND NUND KISHORE, (*Plaintiffs*),
Respondents.

SEE page 99 of the printed decisions for Zillah Agra, for the month of December last.

The case is similar in all its details to case No. 38, this day disposed of, the only difference being, that the plaintiffs are distinct from those in No. 38, and hold a deed of sale for five biswahs of the same village instead of ten, the defendant, Jowahir Singh, holding a deed of sale for the whole fifteen biswahs. For the reasons recorded in the previous case, I dismiss this appeal also.

The 24th June, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 41 OF 1851. { *Regular appeal from the decision of
S. S. Brown, Esq., Judge of Agra,
dated 27th December 1850.*

JOWAHIR SINGH, (*Plaintiff*), *Appellant*,
versus

HUR BUKSH AND CHEETUR MULL, (*Defendants*), *Respondents.*

SEE page 100 of the printed decisions for Zillah Agra, for the month of December last.

This case is similar to case No. 39, immediately preceding the suit, being to redeem the mortgage of 3½ biswahs out of the 15 biswahs, which form the original subject of dispute. I observe an error in reporting this case in the Zillah decision; Hur Buksh

and Cheturmull are the *only* mortgagees of this portion. Jogul Kishore and Nund Kishore are erroneously specified as defendants, they having no concern with this mortgage. For the reasons stated in case No. 39, I dismiss the appeal, with costs.

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The 30th June, 1851.

Present : { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE NO. 80 OF 1851. { *Special appeal from the decision of Moku-
med Ruzzee-ooddeen Khan, Principal
Sudder Ameen of Allygurh, dated 29th
August 1850.*

LUCHMUN AND OTHERS, (*Defendants*), *Appellants*,
versus

BHAGEERUT AND OTHERS, (*Plaintiffs*), *Respondents*.

IN this suit, the plaintiffs sought to establish a proprietary title in two biswahs being a portion of a *thoke* of five biswahs. Their claim is made to rest on ancestral right derived from Darah Sah.

The Court of first instance ruled that Darah Sah had never possessed any interest in the property claimed, and that, although the plaintiffs had made good their pretensions, on other grounds, to be considered sharers in the mouzah, yet they had altogether failed to show that they were entitled to share to the extent demanded. The suit was accordingly dismissed by the Moonsiff.

The Principal Sudder Ameen, passing by the pleas of the parties, decreed, in full, in favor of the plaintiffs, on the ground that they are recorded sharers.

A special appeal was allowed to try, whether the judgment of the Principal Sudder Ameen can be maintained, inasmuch as the plaintiff's claim as heirs of Darah Sah, and although the Moonsiff has found that Darah Sah had no rights in the estate, the Principal Sudder Ameen has passed a decree in favor of plaintiffs without refuting the arguments on this head employed by the Moonsiff; also, whether the simple fact, found by the Principal Sudder Ameen, of the plaintiffs being sharers in the estate, is sufficient to justify a decree to them of a specific portion of the mouzah.

The Court regard the decision of the Principal Sudder Ameen as imperfect and unsatisfactory. The points to be tried are, whether plaintiffs are the heirs of Darah Sah or not, and if they

are, whether Darah Sah or his descendants have had possession within the period allowed by law, of the thing claimed, so as to entitle the plaintiffs to a decree. The mere fact that the plaintiffs are sharers in the estate, to an undefined extent, is obviously insufficient to establish a claim to the proprietary possession of two biswahs.

The suit is remanded to the Principal Sudder Ameen, that he try it with reference to these observations.

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The 30th June, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 40 OF 1850. { *Regular appeal from the decision of H. W. Deane, Esq., Judge of Meerut, dated 10th December 1849.*

NUWAB MOHUMED NUWAB KHAN, (*Defendant*), *Appellant*,
versus
 NUWAB MOHUMED WULLEE DAD KHAN, (*Plaintiff*), *Respondent*.

CASE No. 236 OF 1850.

MOHUMED UBDOOLLAH KHAN, (*Defendant*), *Appellant*,
versus
 NUWAB MOHUMED WULLEE DAD KHAN, (*Plaintiff*), *Respondent*.

THE particulars of the past litigation in this case are detailed in the Judge's decision in the printed volume. It ended in a formal abandonment of all claim to the property in dispute, on the part of the defendant Nuwab Khan, and in a decree thereupon for the plaintiff, who was, however, unable to put the decree in execution by reason of a mortgage on the property, which Nuwab Khan had given, and has now brought his action against Nuwab Khan and the mortgagee, Ubdoolah Khan, for possession of the two mouzahs, with *wasildt*, from 1247 to the half year of 1254 Fuslee. The suit, as first brought, involved a distinct claim for *wasildt* from these and two other mouzahs, for a different period, which was relinquished by the plaintiff, during the progress of the suit. The claim was decreed by the Judge, and the defendants having separately appealed, their appeals may with propriety be considered together.

It has been urged in appeal by Nuwab Khan, appellant, that the reasons pleaded in the answer to the suit were not considered or disposed of by the Judge. Although not noticed *seriatim*, the decision does not lead to the inference that they were over-

looked. The words are "the defendants have little to plead in answer except irregularity in the manner in which the suit is brought," and the decision proceeds to overrule the latter objection. The Judge considered the other reasons of no weight, but the omission of further detail does not, as the appellants argue, render the judgment incomplete.

It has now been urged that the present suit is opposed to the rules in the Circular Order of the 11th January 1889, but this plea, to be of any force, should have been urged in the previous suit, when the question of right was tried. Any objection on the score of the claim having been split by separate suits for portions of the property is not applicable to a supplemental suit for possession, after the right has once been decreed. It has further been urged on the part of the appellant, Nuwab Khan, that the deed of relinquishment filed by him in the last suit was obtained from him by false promises of conditions, which had not been fulfilled, and that the decree founded on it could not stand. The Courts will, however, be slow to allow of the impugnement of a document formally acknowledged, and made the ground of a former decree, and there is nothing in the evidence adduced by the appellant of weight or credibility sufficient to support the assertion. With regard to the *wasildt*, it is pleaded that part of the claim had already been included in a former suit, which had been dismissed, and that it could not be revived. The plea is doubly incorrect. In the former suit, the decision was of nonsuit, not dismissal, and the present decree does not include any portion of the *wasildt* then sued for. An objection in general terms has also been taken to the *wasildt* accounts. These have been filed in the form indicated by the Circular Order No. 1056 of the 29th May 1843, and as no exceptions in detail have been taken to them, the objection is futile.

The same pleas have been adopted by the mortgagee in his appeal, and he argues, in addition, that his mortgage transaction was with the co-appellant Nuwab Khan, who had put him in possession of the mortgaged property, and that as he was no party to the suit between the respondent and Nuwab Khan, in which the deed of relinquishment was filed, his tenure was valid against the decree. This plea is not admissible. The decree being on a claim for a right by inheritance, necessarily avoided the mortgage interests created by Nuwab Khan during the period of his adverse possession, and the appellant is clearly not in a position to resist the decree, unless he could show that it was a fictitious and collusive one, which had been obtained by the parties to it in order to prejudice his interests, but this is not even pleaded.

The decision is accordingly affirmed with costs.

The 30th June, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 115 OF 1851. { *Special appeal from the decision of
Doobé Jowala Pershad, Principal
Sudder Ameen of Azimgurh, dated
12th September 1850.*

SHEODEEHUL RAI AND OTHERS, (*Defendants*), *Appellants,*
versus

BABOO JYNARAIN SINGH, (*Plaintiff*), *Respondent.*

THE plaintiff brought a summary suit in the Revenue Court for the recovery of an arrear of rent for the year 1255 Fuslee, which was dismissed, the Collector being of opinion that there was no sufficient proof of payment of rent in past years. The suit was then renewed in the Civil Court, and the arrears for the years 1256 and half year of 1257 Fuslee were included in the action. A decree was given by both Courts.

A special appeal was admitted to try, whether the suit could be heard under Section 6, Regulation VIII. of 1831.

The suit it appears was brought after the expiration of the period prescribed by law from the date of the Collector's decision, and, as regards the arrears of 1255 Fuslee, it is barred. The decision is therefore amended by the exclusion of the rent decreed for 1255 Fuslee, or Ra. 15-13, from the decree. The costs will be proportioned to the sum decreed.

The 30th June, 1851.

Present: A. W. BEGGIE, *Judge.*

CASE No. 9 OF 1851. { *Regular appeal from the decision of J. P.
Ledlie, Esq., Principal Sudder Ameen of
Bareilly, dated 8th August 1848.*

Mussumat Ranees, widow of Rajah Bugnath Singh, deceased,
(*Plaintiff*), *Appellant,*
versus

Ranees Bysee and Ranees Poomar, and the Collector of
Shahjehanpore, (*Defendants*), *Respondents.*

THIS was a suit to recover possession of twelve mouzahs constituting the talooqua of Nahul, the jumma being Ra. 6,937. The talooqua in question is stated by the plaintiff to have been

the hereditary possession of her husband's family for 100 years. The second and third Settlements were made with her husband. At the Settlement of 1217 Fuslee, her husband declined to engage, and a separate *village* Settlement was made of the several mouzahs, and a *nantar* allowance, enjoyed by the Rajah from the time of his ancestors, was attached by the Collector, but released by order of the Board. The qanoongoes of the pergunnah, being hostile to the Rajah, inserted the names of Rao Sewa Singh and Rao Jeet Singh, (the husbands of the female defendants), in the record of the fourth Settlement, as claimants to the talooqua; but, by order of the Board, they were referred to the Civil Court. At the fifth Settlement, plaintiff's husband applied to be readmitted to engage for the revenue; but the Collector made the Settlement with Sewa Singh and Jeet Singh, which arrangement was confirmed by the Sudder Board, on the 11th July 1817. On the 27th May 1819, the Rajah instituted two suits in the Civil Court against Sewa Singh and Jeet Singh, both of which were dismissed by the Judge of Bareilly, on the 17th May 1838. Plaintiff, (who succeeded as her husband's heir), appealed to the Sudder Dewanny Adawlut, by which authority the suit was remanded to the Zillah Court, for retrial, with orders to make Government a co-defendant. The Judge referred the suit to the Principal Sudder Ameen, who, on the 12th September 1838, passed a decree in favor of plaintiff. The defendants appealed to the Sudder Court, by which, on the 4th and 7th November 1840, the decisions of the Zillah Court were again annulled, and the suit remanded to the Zillah Court, with directions to take an amended plaint from the plaintiff, incorporating the two suits into one. This was done accordingly; and, on the 27th September 1841, a decree was passed in favor of the plaintiff. The defendants appealed to the Sudder Court; by which the Principal Sudder Ameen's decision was upheld, on the 8th August 1843. The defendants applied several times for a review of judgment; and after several rejections of the application, the review was granted, and, on the 28rd March 1847, the plaintiff was nonsuited, on the ground of her having filed *two* supplemental plaints: she has now renewed her suit.

The defendants, in reply, objected, that the plaintiff's claim was altogether unfounded, and barred by the law of limitations. They declared that plaintiff's husband never had possession of the villages, but that, on the contrary, defendants themselves had always held them, with the exception of the period when, in consequence of the Rajah having engaged for the entire pergunnah, these villages also fell into his hands. This temporary possession, which was obtained without any enquiry, they pleaded cannot be regarded as a proof of *right*; and, subsequently, in

1218 Fuslee, the Settlement was made with Sewa Singh and Jeet Singh; an enquiry was made, which established their proprietary right, and they have retained possession ever since. The Collector, on the part of Government, also, denied that the Rajah had ever held proprietary possession of the disputed villages.

The Principal Sudder Ameen, in a voluminous decree, on the merits of which, under existing circumstances, it is unnecessary for this Court to pronounce any opinion, dismissed the suit, on the ground of its being barred by lapse of time. The following is a copy of this decision. "I do not consider it necessary to enter into the particulars of this case in the present stage. The pleadings of the parties will be found in their proper places in the decree. It will be sufficient here to consider the pleas to irregularity.

The Government vakeel demurs that the plaintiff having been referred to the Civil Court in 1827, (1817 is meant), the claim is now barred by the law of limitations.

It is also pleaded that since the plaintiff claims the whole of pergunnah Powayan, under one integral title, a suit for talooqua Nobil, (that talooqua being only a component of the pergunnah of Powayan), is a splitting of the cause of action in contravention of the Circular Order of the 11th January 1839, and therefore irregular.

Whatever may be my own views, and however convinced I may be in my own mind regarding the propriety of the ideas I entertain on these subjects, it is possible I may be altogether in error. I will not conceal my perplexity, arising from what seems to me the conflict in the practice, nor cloak my ignorance of the principles by which it is intended I should be guided. Under these circumstances, I shall first announce my own views, declare the order to be passed in this case specially, and submit the whole to the examination of the Superior Court, to whom I would refer both parties, in order that the questions may be judicially considered, and directions given me, should I be wrong.

Already the Courts have been occupied with this dispute for thirty years, and it is desirable that it should be decided one way or the other. But while the main issue is perplexed and confounded with merely dilatory pleas frequently weakly urged in the Court below, and sometimes not there pleaded at all, but reserved to be brought forward in all their strength in appeal, it is a waste of the time of the lower Court to go through a mass of papers, and to adjudicate on the merits of the case, when it may after all appear that a fatal error was committed on the first step. The time of the Court will thus have been lost,

the parties have been put to heavy expence in filing exhibits, which the Court ought not to have looked at, and the litigants, after years of contest, be found just where they were before. To avoid these lamentable consequences, I shall send both parties up to the Sudder Dewanny Adawlut, in order that all the pleas of irregularity may first be disposed of, for I confess I do not feel free from doubts as to how I ought to proceed in this extraordinary case.

In arresting the cause at this stage, I conceive I am contravening no law, rescript or precedent, and therefore not acting contrary to any rule of practice, for though I may not be able to shew a precedent, the absence of a precedent prohibitory is a proof that the practice has not been fixed. I can find no order interdicting this course, while it is strictly in conformity with the principle recognized in the Court's Circular of the 3rd September 1841, No. 1517.

Both parties agree that the issues, as regards irregularity, are the following :

1st. The plaintiff claiming the whole pergunnah under one title, is she competent to bring suit for a part? ought she not rather to have instituted one suit for the whole pergunnah, including Narain Singh, a relative of Rajah Ragonath Singh, and all the other occupants of the pergunnah.

2nd. Is the cognizance of the suit barred by lapse of time?

At a proceeding held on the 19th July, both parties agree, and admit that these, and these only, are the objections to irregularity.

I would observe that the title pleaded by the plaintiff is prescriptive possession until her husband was ousted, unjustly, as she says. Whether the possession of the plaintiff's husband was such as to entitle him to prescribe is a question on the merits. No one denies his long possession. This, in my opinion, is therefore a case of simple disseisin, and the remedy ought to be sought against all the disseisors in one body, if they acted in league and concert, or by separate suits corresponding with the number of parties or individuals if there was no concert or confederacy. The previous possession of the plaintiff is admitted on all hands, the nature of the possession is the only question, and the only issue on the merits, which it is not my intention to try at present.

The ouster of the plaintiff from the contested villages being the act of Jeet Singh and Rao Sewa Singh, the Collector being merely the instrument, I cannot perceive the propriety of making the Collector a party, as he acted officially. But what connexion is there between Jeet Singh and Rao Sewa Singh and the other parties who have ousted the plaintiff? For my part, I

cannot perceive why they should be made co-defendants when they were not co-disseisors. Such groundless joinders are repudiated by the Construction of the Court No. 860.

I anticipate it will be objected that the plaintiff by suing to prove her title to one talooqua seeks to establish her title to the whole pergunnah, of which this talooqua is only a fraction, and that proving her title in this suit, she will virtually get a decree for the whole pergunnah against all the occupants not parties to this suit. But this is a mistake. It is a universal maxim of law, that no decree can affect parties who were not parties to the suit in which it was passed.

But it will be said that though the order in this suit will not, it is true, as a judicial order, affect third parties, yet will the facts, elicited in this case, be held to be true in suits brought by third parties. This proposition, with certain limitations, is true. If, in the suits brought against third parties, nothing is adduced to impugn the facts elicited in this case, they must of course continue to be held to be true facts, but if the third parties can, by new evidence, show that the facts, pronounced to be true in this case, are really false, I cannot, for my part, conceive why a Court of Justice, in search of truth, should shut its eyes to truth when, by additional light thrown on the subject, truth is distinctly brought to its view. But you stultify your former decision, it may be said. No such thing, I reply? The opinions in the two cases resting on different evidence, as regards quantity or quality, both are correct, and there is no injustice done. The party suffering under the first opinion was the cause of his own want of success, and he cannot justly impute his own neglect to the Court, who can know nothing but what the parties may choose to submit to its judgment. If the additional evidence adduced in the second case existed at the time that the first suit was tried, and was available to the party cast in the first suit, he ought then to have filed it; by not doing so, he suffers not for any fault of the Court. If the additional evidence was not in the knowledge of the party, or not available to him when the first case was decided, the law has indulgently provided a review of judgment, that justice may be secured.

I cannot view this case as one of inheritance, for the Collector and Jeet Singh do not profess to be heirs of Ragonath Singh. The answer on the part of Government states that Rajah Narain Singh (to whose name the words *waghaira* are very improperly appended) are the relatives of the deceased Rajah. Let us then suppose Narain Singh impleaded (for it is impossible for the plaintiff to know who are meant by *waghaira*.) Narain Singh pleads some other Singh *waghaira*, and this other may do the same, and thus we should have an infinite series ever

approximating but never arriving at truth, for after all perhaps some person may be found in possession, when the decree is passed, who claims the property, but was not impleaded.

Title by prescription of these villages, and only of these villages, is the question in this case. If the plaintiff make good this title, she prevails, failing to prove it, she is lost. Pleading prescriptive possession in a suit in which a stranger is the disseisor, in my opinion, it is sufficient if the plaintiff implead the party who dispossessed her, and claim to be restored to possession. Narain Singh either is, or is not, in possession. If he is in possession, the decree in this suit would not oust him, and if he is not in possession, to dispossess him will be an impossibility.

I now come to consider the Circular Order of the Sudder Court dated 11th January 1839, and its supplement dated ——. These orders are intended to prevent the splitting the *cause of action*, generally, in all cases. The applicability of the rule, it is obvious, must depend on what is the *cause of action*. I have before given my opinion that this is not a case of inheritance, but one of simple disseisin, in which the disseisor and disseisee are the only persons who ought to join in the issue. Jeet Singh and Rao Sewa Singh, supported by the Settlement Officer, are the only disseisors of these villages, and they alone ought to be responsible to plaintiff: you must not, it may be said, name the pergunnah, nor mention that it belongs to you; nor shew that it is your property when you sue for only a part of the pergunnah. Such pleading has nothing in it to recommend it to common sense. The proprietor of an adjacent village encroaches on my estate, and in suing to recover my own, I must not say he has encroached on my estate.

The cause of action in this suit is, in my opinion, the dispossession of the plaintiff from the villages claimed, and Rao Jeet Singh and Rao Sewa Singh are alone impleaded, *because* they alone dispossessed the plaintiff from these villages.

But that this suit is correctly brought, I have the deliberate opinion of the Sudder Court, under whose orders the plaintiff originally brought her claim in the present form. The decision in which that opinion was given has, it is true, been set aside by nonsuit, but, be it observed, it was not because that opinion was subsequently held to be erroneous, but because two supplemental plaints had been taken by order of Court. The decree, which was passed in favor of the plaintiff, would to this day have remained in force without any objection to splitting of the cause of action if there had been only one supplemental plaint filed by permission of Court.

If it be said that the Settlement Officer is the common nexus by which all the occupants of the pergunnah are formed into

one body. If this be the rule, let it be declared so, and let it be indispensable that the Collector in all pergunnah Settlements be made a party. Why Government should take part in this particular case with the defendants, and not in every Settlement case, I cannot understand. Government is interested for the welfare of all its subjects, and the Officers of Government ought, in my poor opinion, to deal with all alike; whether a pergunnah be in question or only a small hamlet. The influence of Government ought not, in my humble opinion, to be exercised in particular cases, unless such a course is authorized by law.

Reason, law and convenience, show that the suit is correctly brought. There may be 100 different individuals in the pergunnah claiming under 100 different titles. By trying each title distinctly and separately, intricacy and confusion will be avoided, and the Court will have before it distinct, clear and intelligible issues to try; the rules and forms of Court will be more easily observed, the laws applicable to each title separately applied, and distinct and intelligible judgments be passed, which shall be capable of being executed. Mingle all the adverse claims together, and you have a mass of confusion, a labyrinth, a perfect chaos; 100 titles of different kinds; 1,000 pleas of different sorts, and though apparently one suit virtually, the Court will have to try 100 cases, for what ought to be done by the parties, the Court must, viz., separate the pleadings with reference to the 100 titles in order to compare each with the title of the plaintiff with the object of ascertaining which is the better title. The judgments must be separate, the costs separate, and the execution will be issued out 100 times separately.

The very idea of the tumult and disorder, the picture of the plaintiff standing unsupported, in the midst of 100 opponents, who before were unconnected, now making common cause, and aided by Government, is appalling. Is all this confusion and disorder necessary or desirable in order to try so simple a question as whether the plaintiff was lawfully and justly dispossessed from the talooqua in dispute?

I now proceed to consider the plea in demurrer. It is pleaded by the defendants, that plaintiff having been dispossessed in 1817, her claim is now barred by time. This objection appears to me to be *fatal*. An order of nonsuit, I hold to be a declaration that the plaintiff has as yet brought no suit which the Court can try. If then plaintiff brought no suit on the 27th May 1819, it is manifest that now, after a lapse of thirty years from the date of dispossession, she has lost her remedy.

The decision of the Sudder Court, dated 23rd March 1847, declares, that the Court have no other course to pursue but to

give the appellant the *benefit* of the law, and the Court determined that the plaintiff was entitled to a nonsuit. It first occurred to my mind that the intendment of the Court's decision was, that the period, which had elapsed from the 27th May 1819 to the 23rd March 1847, should be rejected in computing the time, with reference to the law of limitations, and the decision of the Sudder Court, Western Provinces, in the case of Bishoon Dial Dass and others, *versus* Unmool Singh and others, decided 6th June 1843, which, in concurrence with the decision of the Calcutta Court in the case of Imam Buksh Khan, *versus* Nuwab Delawur Jung, decided on the 22nd June 1807, in which case the cause of action arose in 1190 Fuslee, and the second suit was instituted in 1205 Fuslee, fifteen years after, rules, that the time a case is pending in Court shall, on the claim being nonsuited, be rejected from the computation of time. Defendants' party however file copy of a decision of the Western Court of a later date, in the case of Sheo Narain Chowbé, *versus* Baboo Bulram Dass, decided on the 28th April 1845, in which it is distinctly declared that the time a case is pending in Court on being nonsuited shall not be rejected in the computation of time. The grounds of that decision are, that when the Sudder Ameen nonsuited the plaintiff he ought to have appealed. In the present case, the nonsuit has emanated from the Sudder Court, from whose order there was no appeal in the case: it appears to me therefore that the plaintiff has no remedy, and that the claim must be thrown out as barred by time. Costs against plaintiff."

From this decision, the plaintiff appeals. On the 6th March 1849, the record of the case was received from the Zillah, on the 22nd January 1850, the respondents filed a *vakalutnamah*; but their vakeel dying, the hearing of the case was, in consequence, delayed. On the 22nd January 1851, they appointed another vakeel; who, on the 25th of that month, represented that the plaintiff had died on the 4th idem. The usual notice was issued for the appearance of her heir; and, on the 10th February, a person, styling himself "Rajah Jugnath Singh, heir and adopted son" of the deceased plaintiff, appeared, by petition, and claimed to represent her in the appeal. The respondents' vakeel objected to this application, stating, that the plaintiff had left *no* heir, and that the petitioner was an impostor. It became necessary, therefore, before proceeding farther with the appeal, to dispose of this question; and, for the following reasons, I have come to the conclusion that the application of the petitioner, to carry on the suit, as the representative of the deceased plaintiff, is inadmissible. 1st. From 1833, up to the date of the Ranee's death in January last (a period

of eighteen years), no mention was made by her of the existence of the petitioner, or of his adoption, either by herself, or the deceased Rajah. She herself has throughout prosecuted the original suit, and appeal, as the *heir* of the Rajah. 2nd. In the three petitions presented by the petitioner, to this and the Zillah Court, he represents himself as the adopted son of the *Ranee*. Now a Hindoo widow cannot adopt without the permission of her husband. It must be satisfactorily proved that the husband had, previously to his demise, granted such permission. But this is not even alleged by the petitioner, in his petitions above referred to. He seems to have thought that the *Ranee* was competent to adopt of her own free will. 3rd. The witnesses produced by the petitioner in the Court of the Principal Sudder Ameen at Bareilly, to prove his adoption, give evidence quite opposed to the statement of the petitioner himself; they declare, that the *Rajah* adopted the petitioner, in his *life-time*, and made over the management of all his affairs to him; a statement not only inconsistent with that of the petitioner, but with the proceedings of the *Ranee*, who would, of course, have made known the circumstance to the Court, and have caused the petitioner to be recorded as the *Rajah's* heir instead of carrying on the suit herself.

It is evident that the petitioner having, subsequently, discovered the mistake he had made in representing himself as the adopted son of the *Ranee*, without reference to her husband's consent to such a measure, sought to rectify it, by instructing his witnesses to depose in the manner they have done.

I accordingly direct that the case be struck off the file, in consequence of the abatement of the appeal by the death of the appellant without heirs.



The 30th June, 1851.

Present: A. W. BERRIE, Judge.

CASE No. 130 OF 1850. { *Regular appeal from the decision of
Moulvee Mohamed Ruzee-ooddeen
Khan, Principal Sudder Ameen of
Allypore, dated 22nd May 1850.*

MOOZZUM KHAN AND OTHERS, (*Defendants*), *Appellants*,

versus

KHOONDUN SINGH AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS was a suit to obtain possession, by redemption of a mortgage, of ten biswahs in mouzah Utrowlee, and to recover Rs. 8,438-9, principal and interest of the surplus *memee* proceeds. Plaintiffs state that the ten biswahs in question are their hereditary property; that, on the 5th March 1826 A. D., Nuwul Singh (the father of the plaintiffs, Khoondun Singh and Sher Singh) in conjunction with Nusrut Khan (grandfather of the plaintiffs, Seroo Khan and Bhikum Khan) and Chutter Singh (who is represented by Dowlut Singh and Kesree Singh, plaintiffs) mortgaged the property to Bhugwan Dass and Seeta Ram, for Rs. 1,714-5, and, at the same time, executed a deed of *kutkinnah* for the period of four and a half years, viz. from the Rubbee of 1233 to the end of 1237 Fuslee, agreeing to receive a *malikana* allowance of Rs. 107-2-6 per annum and no more, and possession was given to the mortgagees on the 1st July 1826. The mortgagees, after some years, submortgaged the property to Moouzzum Khan and others, defendants, who were claimants to the *remindaree*, though not in possession. These latter brought a suit against plaintiffs to recover two-thirds of the ten biswahs, but were nonsuited on the 20th July 1841. Plaintiffs then sued Moouzzum Khan and others for redemption of the mortgage, but were likewise non-suited on the 7th March 1843. Moouzzum Khan and his party having subsequently obtained a decree against Bhugwan Dass and Seeta Ram, the original mortgagees, obtained possession of the estate, and, notwithstanding the mortgage has been more than redeemed by the profits, they refuse to relinquish possession. Mittum Singh and others, defendants, are likewise descendants of the original mortgagees, but as they have coalesced with Moouzzum Khan's party in the sub-mortgage, and would not unite with plaintiffs in this suit, plaintiffs had no option but to make them defendants; but they express their readiness to restore to

them their portion of the ten biswahs, when the same shall have been redeemed.

The defendants, Moouzzum Khan, Methum Singh and others, reply, that plaintiffs have a right to a very small portion only of the ten biswahs, that as defendants are themselves co-proprietors, plaintiffs have no right to sue them for *wasilât* : they urge that plaintiffs have not, in their present suit, rectified the irregularities which led to their being nonsuited in their former suit. Defendants have purchased the mortgage held by Bhugwan Dass and Seeta Ram, in which transaction Mendoo Khan (the father of Seroo Khan and Bhikum Khan plaintiffs) was a partner, his sons, therefore, can have no claim to *wasilât* from them. Sher Singh and Khoondun Singh, plaintiffs, have, moreover, given receipts to the original mortgagees, Bhugwan Dass and Seeta Ram, for the *wasilât*. They can, therefore, sue for no more than the redemption of their own portion of the estate. Defendants, further, hold two other bonds of the plaintiffs, which have been tacked on to the original mortgage, to the amount of Rs. 1,068, and they have incurred sundry heavy charges connected with the estate: so that it will be found, on calculation, that a balance is due to them, instead of from them.

The mortgagees, Bhugwan Dass and Seeta Ram, plead that, having transferred their mortgage to Moouzzum Khan and others, they have no personal interest left in the matter under litigation, and that Moouzzum Khan and others are solely responsible to the plaintiffs.

The Principal Sudder Ameen gave a decree in favor of the plaintiffs. He observed that the plaintiffs were fully justified by judicial precedents in suing for the redemption of the whole ten biswahs; that as *all* the representatives of the original mortgagers are joined in the suit, the objections, which necessitated the nonsuit in the former case, were obviated: he determined the balance due to the plaintiffs to be Rs. 5,903-4-9½ instead of Rs. 8438-9, as claimed by them. He disallowed the deductions claimed by the defendants on account of balances of rent, said to be due from plaintiffs, and other cultivators; nor would he regard the defendants in any other light than that of *mortgagees*; it being improper in a suit for redemption of a mortgage to determine the specific shares of the parties. The Principal Sudder Ameen did not consider the mere entry of Mendoo Khan's name in the bond given to the original mortgagees a sufficient ground for withholding *mesne* proceeds from his representatives, Bhekhun Khan and Seroo Khan, seeing that Mendoo Khan's name was not in the *byenamah*, and because the bond itself is still the subject of judicial enquiry. The receipt for *wasilât*, purporting to have been given to the original

mortgagees by the plaintiffs, Khoondun Singh and Sher Singh, he considers to be a forgery, no mention of this document having been made by Bhugwan Dass and Seeta Ram in their reply to the first suit instituted against them by the plaintiffs: he attached no weight to the discrepancies between the calculations of the plaintiffs in their former and present suit, and the two bonds, tacked on to the mortgages, supposing them to be genuine, having been executed by the heirs of Nuwul Singh *only*, are not of force against the four plaintiffs, who are not heirs of Nuwul Singh. He rejects the plea of Moouzzum Khan and his party, that the original mortgagees, Bhugwan Dass and Seeta Ram, are *alone* liable for the *wasildt*, holding that the *former* stand in the place of the *latter*, and must assume all their responsibilities. The Principal Sudder Ameen accordingly decreed for the redemption of the property, with the sum above specified as *wasildt*. The defendants have appealed from this decision.

The decision of the Principal Sudder Ameen is on the whole just and agreeable to the evidence. The precedent,* quoted by the defendants is not in point. In that case, there were special reasons assigned for deviating from the general rule regarding the redemption of mortgages. The plaintiffs

* Mullickbasa, Appellant,
versus
Dhara Beebee and others,
Respondents.
The 5th August 1850, S.D.A.,
N. W. P.

in the present case, if debarred from suing in the manner they have done, would be unable to redeem the mortgage at all. In respect to the *farkhuttee*, I quite agree with the Principal Sudder Ameen in discrediting it, for the reasons stated by him; but it has escaped his observation that the *farkhuttee* is dated 29th January 1838, and purports to be a receipt for *malikana* up to the end of 1249 Fuslee; a period corresponding with the 19th September 1842, the amount, therefore, was not *due* till nearly five years *subsequent to the date of the farkhuttee*! There are only two points in the Principal Sudder Ameen's decision, which require correction, viz. his refusal to give the defendants credit, in account, for the balances of rent, due from the plaintiffs, and to make a deduction from the amount of the vakeel's fees, which had been made higher than they ought to have been, by the mistake of the plaintiffs in over estimating their suit. Both these objections are good, and as the respondent's vakeel expresses his readiness to accept this modification of the

* From amount of claim Rs. 1344 14 9
Do. do. cost Rs. 50 4 0
Total Rs. 1395 2 9

decree, I direct the same to be made, without reference to a full bench. The items thus deducted from the decree are noted

in the margin.*

In regard to the *farkhuttee*, which there is such strong ground to believe to be a forgery, a separate proceeding will be addressed from this Court to the Magistrate of Allygurh, with instructions to institute an enquiry under the provisions of Act I. of 1848, against the parties filing the suspected document, with a view to their commitment for trial, should the evidence in his opinion be sufficient for conviction.



The 2nd July, 1851.

Present : A. W. BEGBIE, Judge.

CASE NO. 125 OF 1851. { *Special appeal from the decision of F. P. Buller, Esq., Officiating Judge of Furruckabad, dated 26th February 1851.*

TEJA, (Defendant), Appellant,

versus

SOOMEER SINGH AND OTHERS, (Plaintiffs), Respondents.

THIS case will be found reported at page 34 of the printed decisions for zillah Furruckabad, for the month of February last.

A special appeal is admitted to try, whether in disposing of "this suit, the Officiating Judge has not omitted to notice and "record an opinion on a point material to its adjudication."

The Court observe that the Judge has confined his deliberation to the simple fact, of whether the *wajib-ool-urz*, or village declaration of rights, was assented to by Puhulwan, or not. But this is not sufficient, admitting that Puhulwan was a consenting party to the *wajib-ool-urz*, it remains to be considered, whether, or not, he conformed to the conditions of that document. The rule prescribed therein, relative to private transfers by the village brotherhood, is to the following effect. "If any putteedar is desirous of selling or mortgaging his share, *in the event of a hissehदार not taking it*, he is at liberty to transfer it to a stranger." The obvious meaning of this provision is, that any hissehदार wishing to mortgage or sell his share shall, *first*, offer it to all the village shareholders; and in the event of their refusing to take it, then, *only*, is he at liberty to transfer it to a stranger. The appellant pleads, that Puhulwan *did* so offer it to his brethren in the village, before he sold it to him; and that none of them "were willing to purchase it." If this be true, it is obvious, that the conditions of the *wajib-ool-urz* have been fulfilled; and that there is no flaw in the sale made by Puhulwan to the appellant. But the Judge has not gone into this point; and, without enquiry, has *assumed*, that Puhulwan did *not* conform to the conditions of the *wajib-ool-urz*. I accordingly, annul the Officiating Judge's decision, and remand the case to be dealt with in the manner indicated in the foregoing remarks.

The 2nd July, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 120 OF 1851. { *Special appeal from the decision of R. J. Tayler, Esq., Judge of Jounpore, dated 16th July 1849.*

RUJESUR SINGH AND UMR SINGH, (*Plaintiffs*), *Appellants*,
versus

ODDWUNT SINGH, (*Defendant*), *Respondent*.

THE Judge's decision is in the printed volume of the month.

A special appeal was admitted to try, whether a decision should not have been given on the merits.

The suit was for partition which was decreed by the Principal Sudder Ameen on proof of possession. In appeal, the Judge considered the suit barred by the limitation statute, and dismissed it. The right of partition being inherent to proprietary possession without any bar of limitation, the fact of such possession at the time of suit would alone have to be considered in a suit of this nature, and on the proof adduced, a decision would necessarily follow on the merits. The limitation statute is not therefore directly applicable to the claim, but the Judge's reasoning tends to the conclusion, that the appellants had not been at any time in proprietary possession so as to be in a position to claim partition. The point of law, on which the suit was disposed of, thus involved a decision on the real points of fact in the case, and there is consequently no point left to be considered in special appeal. The appeal is dismissed.

The 5th July, 1851.

Present: H. W. DEANE, Judge.

CASE No. 251 OF 1850. { *Regular appeal from the decision of Abdoel Ruhman Khan, Principal Sudder Ameen of Benares, dated 17th September 1850.*

GHUNSEAM DASS AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

AITMA RAM, *palneh*, (*Defendant*), *Respondent*.

CLAIM, to be put in possession, and to be recorded in place of the defendant as mortgagees of mouzah Alumpore, under a *ruhinnamah bhog bunduk* dated 12th December 1825; and to

recover Rs. 6,870-15, *wasildt*, from the half of 1246 Fuslee, to the half of 1257 Fuslee.

Hoossein Buksh, proprietor of mouzah Alumpore, mortgaged that estate to Soondur Dass and Ghunseam Dass, (father and son) for ten years, from 1233 Fuslee to 1243 Fuslee, under a *rukinnamah bhog bunduk*. In the year 1836, Hoossein Buksh desired to sell the estate to Aitma Ram, and having deposited in Court Rs. 1,000, the amount of the mortgage money, applied to redeem. The Court on the 19th August 1836 passed an order in the Miscellaneous Department, for redemption. The mortgagees appealed to the Sudder Dewanny Adawlut, and that Court, under Orders dated 24th May and 24th June 1837, cancelled the proceeding of the Judge as held improperly in the absence of a regular suit to redeem, and of any adjustment of accounts as required by law, and directed the reinstatement of the mortgagees. It was in contemplation to take the requisite steps for redemption, when, in order to obviate delay, the parties arranged the matter among themselves, by Aitma Ram placing in the hands of a *muhajun* the sum of Rs. 1,300, which the mortgagees consented to accept in satisfaction of their claims in full, and by the latter filing a *soolehnamah* in Court through their vakeel on the 7th September 1837, to the effect, that they were satisfied, and that they relinquished all demands on the mortgaged property. It is contended by the plaintiffs that Aitma Ram withdrew the money lodged in the *muhajun's* hands, that the *soolehnamah* was invalid, and did not take effect, and that they are consequently in a position to sue to be replaced in possession as mortgagees.

The main pleas of the defendant are, that the suit is barred by lapse of time; the plaintiffs never having obtained possession under the order of the Sudder Court, and that the plaintiffs, after the formal tender of a *soolehnamah*, are not at liberty to sue for possession.

The Principal Sudder Ameen held with respect to the plea in bar, that there existed indications of the temporary possession of the plaintiffs under the injunction of the Sudder Court, though it is evident from the wording of his judgment on this point, that he entertained some doubt, whether it were an actual and *bona fide* possession, or a mere type of possession, such as is furnished by a *dukkhulnamah* put in by the nazir of the Court, in obedience to an order issued to him. With regard to the *soolehnamah*, it was the opinion of the Principal Sudder Ameen that the tender of that document by the plaintiffs, uncharged as it is with any conditions, and containing a full and formal surrender of all claims on the mortgaged property, is wholly incompatible with the asserted right to recover possession. If the money

lodged in the banker's hands by Aitma Ram was not received by the plaintiffs, the plaintiffs might sue for it. Accordingly, the Principal Sudder Ameen threw out the claim.

I concur in the judgment passed by the Court below. The *soolehnamah* was filed by Soondur Dass and Ghunseam Dass through their duly constituted vakeel. In its letter not less than in its spirit, it is a complete renunciation of all demands on the estate which they had held in mortgage. It is true that the son Ghunseam Dass, in consequence, as it would seem, of some dispute with the purchaser Aitma Ram, afterwards presented a petition for the recall of the *soolehnamah*, on the plea that he was not a party to it; but this application was unheeded by the Judge, and the case was struck off the file in virtue of the *soolehnamah*, with a full knowledge at that time possessed by the Judge, and a notice by him in his *roobakaree*, of the attempted revocation. The plaintiffs were not then allowed, nor can they now be allowed to recede from an act advisedly performed. The appeal is dismissed.

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The 7th July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 30 OF 1851. { *Special appeal from the decision of S. Fraser, Esq., Judge of Barcilly, dated 26th July 1850.*

HEERA SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

BYAN-COLLAH AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are stated in the printed decisions of the month.

A special appeal was granted to determine, whether the Judge's decision is according to law.

The plaintiffs sued under a hereditary title for the separation and possession of the lands of Gungapore Belah attached to *puttee* Duttee, engagements for which had been refused by them at the time of Settlement, with arrears of profits. The Principal Sudder Ameen recognized the proprietary right as belonging exclusively to plaintiffs, and decreed the possession and separation, but dismissed the claim to profits, and declared the *malgoozaree* right to be in abeyance. The Judge in appeal concurred in the finding of the lower Court on the facts of the case, and noticed the obvious error committed by the Principal Sudder

Ameen in decreeing during the currency of the existing engagements, possession and separation to a proprietor who had been excluded by his own act, but proceeds to observe, "The present suit has evidently been brought with a view to disturb the Settlement, but as the Settlement was perfectly regular, the action will not lie, and under any circumstances the claim is not regularly assessed." On these grounds a nonsuit was declared.

The Judge's decision leaves it in doubt on which of the two grounds the nonsuit was based, but as the Court do not find that any objection was taken to the suit by the opposite party in either Court on the score of undervaluation, or that there was any self-evident infraction of the rule in Clause 1, note to Article 8, Schedule B, Regulation X. of 1829 to call for a nonsuit, they regard the intention of the Judge to have been rather to nonsuit on the first ground, and they see no reason to interfere with the decision, which is consonant with the decision of the Court in a parallel case, Mookut Singh, *versus* Urjoon Singh, No. 166, 9th September 1850. The plaintiffs having sued for what the Courts cannot give them, an order of dismissal of the suit would have been more regular, but the appellants cannot be placed in consequence of their appeal in a worse position than before, and the appeal is therefore dismissed with costs.

The 7th July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offy. Judge.*

CASE NO. 47 OF 1851. { *Special appeal from the decision of*
C. Allen, Esq., Judge of Furruckabad
dated 6th September 1850.

KOONWUR GOORDIAL SINGH, (*Plaintiff*), *Appellant,*
versus

KOONWUR ROSHUN SINGH, (*Defendants*), *Respondents.*

THIS case will be found reported at pages 192 and 193 of the printed decisions for Furruckabad for the month of September last.

A special appeal was admitted to try, "whether the Judge's declaration, 'that the award of a private arbitration for money cannot be made the sole ground of a decree;' and his dismissal of the suit, because with that exception 'of the award there is no proof in this case of the liability of the appellant for the sum demanded,' be agreeable to law or otherwise."

The Court observe that the question mooted in the certificate of special appeal has already been decided by this Court in the case of Punchum, *kussodhun*, appellant, *versus* Purumsookh, respondent, under date 14th January 1846, in which the cause of action was precisely the same as in the present case. On that occasion the Court ruled, that "the engagement to arbitrate, and to fulfil any award which may be passed thereon, must be regarded in the same light as any other engagement between parties, capable of fulfilment, and the plaintiff may, therefore, bring his action to recover any amount adjudged by the arbitrators to be due to him." The rule above recited must govern the present case also, and the Court, accordingly, annul the decision of the Judge, and remand the case to be tried on its merits, or in other words, that enquiry may be made into the fact of arbitration, which is denied by the respondent, and judgment passed agreeably to the result of that enquiry. The Court do not understand the Judge to have recorded any opinion on this point. Had such been the case, the appeal might have been at once disposed of by this Court, without the necessity of a remand.

The 8th July, 1851.

Present : { A. W. BEGGIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 60 OF 1851. { *Special appeal from the decision of R. J. Tayler, Esq., Judge of Jounpore, dated 15th August 1850.*

MUJJOO SINGH, (*Plaintiff*), *Appellant,*
versus

RAJAH SHEO GHOLAM DOOBE, (*Defendant*), *Respondent.*

THIS case will be found reported at pages 92 and 93 of the printed decisions for Zillah Jounpore for the past year.

A special appeal was admitted to determine, "whether the reasons assigned by the Judge for giving a decree in favor of the defendant agreeably to the *jummabundee* papers are sufficient, and according to law."

The Court are of opinion that the decision of the Judge is erroneous, and cannot be sustained, the reasons assigned by him, for dismissing the appellant's claim, are stated to be "because the *ishteehar* at the Settlement Court was published after the decree was granted," and because "the plaintiff neither objected or petitioned to have the *jummabundee* altered," and it is further

stated that "each year's *jummabundee* exhibited the land and *jumma*, as stated by the defendant." The Court observe, that it is apparent on the record, that so far back as December 1840, the rate per beegah, payable by the appellant, had been fixed by a regular decree of the Civil Court at one rupee, and that in 1847, the defendant obtained a decree against the appellant, for Rs. 54-11 on 54 beegahs 14 biswahs of land; being exactly the rate previously fixed by the decree of 1840. The demand now made by the defendant is for Rs. 68-6, on the above quantity of land, being at the enhanced rate of Rs. 1-4 per beegah. The statement of the respondent, therefore, that the appellant has *always* cultivated this land, at the rent now sued for, and the remarks of the Judge, that "each year's *jummabundee* exhibited the land and *jumma*, as stated by the defendant," are not correct, and it is clear, that the *jummabundee* affixed at the Collector's Office, which the Judge recognizes as the only legitimate standard, whereby to regulate the demands of the zemindar on the cultivators, has, in the present instance at least, been set aside, and superseded by the subsequent decree obtained by the defendant himself in 1847.

The Court for the reasons above recorded, reverse the decision of the Judge, and uphold the decision of the Court of first instance, which is in their opinion in accordance with the law.

The 8th July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 15 OF 1851. { Special appeal from the decision of
S. Fraser, Esq., Judge of Bareilly,
dated 27th September 1850.

LALJEE, (Plaintiff), Appellant,

versus

THAKOOR MOTEE SINGH AND OTHERS, (Defendants),
Respondents.

For the particulars of this case, the reader is referred to the printed decisions of the Zillah Courts for September 1850, page 189.

A special appeal was admitted to try, whether the Judge was authorized to set aside the plaintiff's claim of preëmption.

The Court are of opinion that the main point on which the decision in the present suit must turn has not been tried by the

Judge. The plaintiff's claim of preëmption has been rejected, on the ground of delay to urge it, but under the *wajib-ool-urz* of Settlement, it was not competent to Mookram, the seller, to dispose of the property to a stranger, until the plaintiff, Laljee, had been allowed the option of purchase, and had declined to purchase. It is asserted by the seller that he duly made an offer to Laljee, while it is pleaded by Laljee, on the other hand, that the transaction was studiously concealed from him. It will depend on the value which the lower Court may attach to these pleas, whether the claim of Laljee is sustainable or not.

The suit is therefore sent back to the Judge, in order that he re-try it with reference to these observations.

The 8th July, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 83 OF 1851. { *Special appeal from the decision of A. Lang, Esq., Judge of Allahabad, dated 9th September 1850.*

RIKEE RAM, (*Plaintiff*), *Appellant,*

versus

ZALIM SINGH, (*Defendant*), *Respondent.*

THE volume of the printed decisions for the month contains the particulars of this case.

A special appeal was granted to try, "whether the Judge has not contravened judicial usage; that is to say, whether the Judge is not wrong in declaring that the plaintiff's suit to set aside a fraudulent transfer must necessarily be thrown out, because the property in dispute was not attached pending the adjudication of the plaintiff's suit against Khoshal Singh, and because the deed held by the defendant is registered, and that held by the plaintiff not registered; whereas the claim of the plaintiff in the present suit is founded on the decree of Court, formerly passed in his favor, not on the deed of sale which he holds."

The Judge's decision is, in the opinion of the Court, erroneous. He has adopted so much of the reasoning of the defendant as is of no force, and has omitted a finding on the only plea in defence, the proof of which would justify the Court in withholding from the plaintiff the decree he seeks. It was nothing for the defendant to plead in answer, and for the Judge to urge in his decision, that the plaintiff did not attach the property

pending the adjudication of his suit against Khoshal Singh, for if it be established in the present action, as it has apparently been established in the suit brought by plaintiff against Khoshal Singh, that the plaintiff is the rightful owner of the disputed land; the plaintiff cannot lose by his failure to attach what it was not in the power of Khoshal Singh to alienate to the present defendant. As little to the purpose is it for the Judge to insist in his decision on the plea in defence, that the deed of sale to Zalim Singh was registered, and the deed of sale to the plaintiff not registered, for whenever a registered deed invalidates under Act XIX. of 1843, an unregistered deed, it is an express proviso of that law that the "authenticity" of the registered deed "be established to the satisfaction of the Court." The real point to be tried in the present suit, and on which both parties have joined issue, is contained in the third plea in defence, viz. "that the *byenamah* in the plaintiff's name is fraudulent, and that no money was ever paid to Khoshal on it." If this plea be proved, the decree held by the plaintiff against Khoshal Singh cannot stand, being based on a fictitious transfer; if it be not proved, the plaintiff is entitled to a decree in the present action, and it will avail Zalim Singh nothing that he "really purchased the estate," because, in the event last supposed, he will have purchased what did not belong to the seller.

The suit is remanded to the Judge for retrial with reference to the above remarks.

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The 10th July, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE NO. 31 OF 1851. { *Regular appeal from the decision of Moul-
vee Abdool Azeez, Principal Sudder
Ameen of Ghazeepore, dated 12th De-
cember 1850.*

RAMROOP SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

RAMDEHUL SINGH AND OTHERS, (*Defendants*), *Respondents*.

SUIT, for proprietary possession of 100 beegahs of land in talooqah Koondeshur, and for Rs. 10,995 proceeds of the same, from the year 1247 to 1256 Fuslee, total estimate of suit Rs. 14,995.

The plaintiffs brought an action in 1837 against the defendants to recover the value of produce. The suit ended in a compromise between the parties, defendants agreeing to make over to plaintiffs 100 beegahs of land in proprietary possession

at a fixed rent of Rs. 75. Ten years afterwards, plaintiff applied in the Miscellaneous Department for execution of the *soolehnamah*, but the application was refused, and he was referred to a regular suit. An application was then made for permission to institute a suit in *formâ pauperis*, which after the usual enquiry was rejected. In the meantime the twelve years, from the date of the *soolehnamah*, had lapsed, and the suit was brought seven months after the term.

Defendants advanced the plea of limitation, and the Principal Sudder Ameen admitted it. He observed that possession at any period within the limitation was not alleged, and that the application for leave to sue as pauper could not save the lapse. He rejected the plaintiffs' argument, that the order in the Miscellaneous Department new dated his cause of action. For these reasons the suit was dismissed.

The plaintiffs have renewed their reasons in appeal, and urge that the defendants did acknowledge their possession of 80 beegahs of the land, in a petition filed by them in the Miscellaneous Department in 1847, in answer to their application for execution, and it appears that such acknowledgment was made, but the plaintiffs in their replication in the lower Court directly denied, that the 80 beegahs in question were part or parcel of 100 beegahs now sued for, and they cannot now be permitted to take up different ground in their appeal. The other reasons in the judgment are supported by rule and precedent, for which it is enough to quote the decision of the Court of the 27th May 1850, No. 236, and the Construction No. 813 in regard to the insufficiency of an application in *formâ pauperis*, and of a miscellaneous application to save the limitation. The appeal is dismissed, without summoning the respondents.

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The 14th July, 1851.

Present : { A. W. BEGHIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

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CASE NO. 220 OF 1850. { Regular appeal from the decision of
Mohumed Ruzee-ooddeen Khan, Prin-
cipal Sudder Ameen of Allygurh,
dated 26th August 1850.

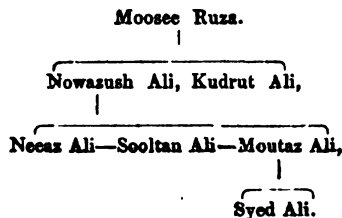
SYED ALI AND MUSSUMAT JEEONEE, (Plaintiffs), Appellants,
versus

SOOLTAN ALI, NEEAZ ALI AND OTHERS, (Defendants), Respondents.

THE plaintiffs sue for possession and partition of ten biswahs in five several mousahs, in pergunnah Attrowlee, zillah Allygurh,

together with *wasildt*, and for a share in the above proportion to certain building ground, *baghs* and dwelling houses. The full value of the suit is Rs. 12,856-3.

The main portion claim of the plaintiffs is founded on hereditary right: Syed Ali is the son of Mussumat Jeeonee, and the defendants, Sooltan Ali and Neeaz Ali, are uncles of Syed Ali. The pedigree is as underneath.



The plaint sets forth that Nuwazush Ali, the grandfather of Syed Ali, disinherited his son Neeaz Ali, on account of his ill repute, and made over by *hibbehnamah* all his property to his two remaining sons, Sooltan Ali and Moutaz Ali. These latter were placed in possession, and an allowance of Rs. 4 per mensem was made to Neeaz Ali, of which the payment was provided by an *ikrarnamah* executed by the two brothers of Neeaz Ali. Sooltan Ali and Moutaz Ali, (father of Syed Ali), were found to be in joint possession at the Settlement in 1838 A. D. In 1249 Fuslee, Moutaz Ali died, leaving the plaintiff, Syed Ali, then twelve years old, another son aged two years, and a widow, the plaintiff, Mussumat Jeeonee. Sooltan Ali took advantage of the minority of his nephews to establish himself, and has recorded in the *khe-wut* papers of 1251 Fuslee, with the object of defrauding the plaintiffs, that the plaintiffs are entitled merely to an allowance in land and money, specified as 93 beegahs 6 biswahs, and Rs. 30 *malikana*.

Sooltan Ali answers, that the date of the *hibbehnamah* is not given, nor is the document itself produced. It is asserted that Neeaz Ali was not disinherited, as alleged, and that Moutaz Ali, father of Syed Ali, has never been in possession. Nowazush Ali and Kudrut Ali, resigned the *malgoozaree* of the five mouzahs, and from 1213 Fuslee to 1227 Fuslee, the Settlement was made with farmers. At the Settlement of 1228 Fuslee, Nowazush Ali had become blind, and about the same time Kudrut Ali died. The defendant, Sooltan Ali, applied for revenue engagements on the part of Nowazush Ali, and the *durkhast* was accepted, Neeaz Ali was pensioned off, and Nowazush Ali, having reason to be dissatisfied with Moutaz Ali, placed Sooltan Ali in sole possession. On the 9th June 1820, Nowazush Ali constituted by formal deed, Sooltan Ali his sole heir, and Sooltan Ali obtained from the Col-

lector an engagement in his own name, with the assent of Motee Begum, widow of Kudrut Ali. In 1231, an allowance in land and money was made to Moutaz Ali by his brother Sooltan Ali, and it was enjoyed by Moutaz Ali during the rest of his life. Moutaz Ali living and dying in a separate residence, Syed Ali, it is said, has succeeded to that allowance which was drawn by his father for twenty years, by himself during seven years; and to set up a present title on a *hibbehnamah* is not permissible, since according to Construction 942, a person who has received a maintenance from his family is precluded from laying claim to a share in the family estate. Moreover the plaintiff, Syed Ali, on the 21st November 1849, reported at the Attrowlee thannah, that 300 *kutcha* beegahs of *seer* land, belonging to him, had been confiscated by Sooltan Ali, and that Sooltan Ali entertained designs on his life. No *hibbehnamah* was put forward at the recent Settlement in behalf of the plaintiffs, and in the *roobakaree* of 23rd February 1838, Sooltan Ali is recorded as lumburdar, engagements having been taken from him for all the five villages, from 1246 Fuslee to 1265 Fuslee.

Neeaz Ali replies that he was not disinherited, that no *hibbehnamah* was executed, nor any *ikrarnamah*. Descendants of Kudrut Ali are living, and they are entitled to share in the property of the common ancestor. At the Settlement of 1228 Fuslee, the engagers were Nowazush Ali and Sooltan Ali, and the respondent Neeaz Ali was allowed by his father Rs. 4 per mensem. After the Settlement of 1228 Fuslee, Sooltan Ali, acting under the authority of Nowazush Ali, made a provision for Moutaz Ali, as above specified, and in like manner arranged for the maintenance of other members of the family. At the last Settlement, the claims of other branches of the family were not attended to, nor can those of the plaintiffs be taken into consideration.

In replication the plaintiffs urge, that the *hibbehnamah*, though not forthcoming, is proved to have existed by a reference to the *kheewut* papers of 1247 Fuslee, and to the putwarree's and qanoongoe's records.

The Principal Sudder Ameen observes, that Nowazush Ali was formerly in possession as of hereditary right, and that according to the plea of the defendants, Nowazush Ali, on the 9th June 1820, drew up a *mookhtheearnamah*, in virtue of which he constituted his son Sooltan Ali, head and representative of the family, the name of Nowazush Ali being also recorded in the Settlement papers with that of his son Sooltan Ali. The suit, in the opinion of the Principal Sudder Ameen, is not barred by lapse of time, though that plea is put forward; for the Principal Sudder Ameen does not regard the paper of the 9th June 1820, as exclusively vesting Sooltan Ali with the territorial possession of the family,

but only as pointing him out as the fittest manager of the family interests; and inasmuch as Nowazush Ali died subsequently to the Settlement in 1838, the claim is brought within the legal period. In regard to Neeaz Ali, the Principal Sudder Ameen remarks that he has asserted indeed that an allowance of Rs. 4 per mensem was made to him; but it is evident that this assertion has been made at the bidding of Sooltan Ali; and since it is shown by the answer of Neeaz Ali that there are other living descendants of Nowazush Ali, the plaintiffs cannot, to the prejudice of the interests of those parties, succeed to the half share of the entire property; though beyond question the plaintiffs are entitled to some portion of the property. The Principal Sudder Ameen accordingly dismissed the suit, but with this reservation in favor of the plaintiffs, that nothing contained in his present decision shall operate to prevent the plaintiffs coming again into Court, in order to the establishment of their title to such portion of the estates as lawfully devolves on them.

The main pleas in appeal are, that Neeaz Ali himself avers that he has been pensioned, and lays no claim to possession, content with the provision assigned him, and that it is idle to say that Neeaz Ali's answer has been dictated by Sooltan Ali. In regard to the Principal Sudder Ameen's declaration that there exist other heirs of Nowazush Ali, the information on that head has been gathered, the appellants contend, entirely from the representation of the defendant Neeaz Ali. The point to be tried is, whether Sooltan Ali and Moutaz Ali held jointly after their father's death, and the appellants urge that the documentary evidence to this fact is ample, and that the Principal Sudder Ameen should confine his judgment to the points at issue between the parties. It is added that the lower Court has allowed separate costs for Neeaz Ali and Sooltan Ali, notwithstanding that their replies are to the same purport.

The Court collect from the record clear proof of the fact that the share claimed was held by Moutaz Ali, father of the plaintiff Syed Ali, up to the time of the death of Moutaz Ali, which event took place in 1249 Fuslee, or about 1842 A. D. In the *tufreek thoke puttee* drawn out on the 14th April 1838, it is recorded that Sooltan Ali appeared and said "my brother Moutaz Ali and myself are in joint possession, and we will manage the *malgoozaree* jointly." This paper is signed by Sooltan Ali, Moutaz Ali, and the village putwarree. Again in the paper of mutation of names for 1249 Fuslee, it is set down that Syed Ali aged twelve years, Soojad Ali, aged two years, and Mussumat Jeeonee are the surviving relatives, viz. sons and widow, of Moutaz Ali. Further the *kyfeet* column of the paper of changes

in the *lumburdaree* for 1251 Fuslee, contains the following: "Sooltan Ali is *lumburdar*; up to the end of 1250 Fuslee, the widow and sons of Moutaz Ali remained in possession, and the *lumburdar* has this year, (1251 Fuslee), assigned 93 beegahs 6 biswahs to the family of the late Moutaz Ali." Thus is completely refuted the statement of the defendant, Sooltan Ali, that his father excluded Moutaz Ali from the inheritance as well as Neeaz Ali, even if the fact of Nowazush Ali having associated himself at the Settlement of 1228 Fuslee, with Sooltan Ali were not, in itself, a sufficient indication, that it was not the intention of Nowazush Ali to invest Sooltan Ali with the sole proprietorship, but simply with the management of the family estate. As respects the *hibbehnamah* said to have been executed by Nowazush Ali, the Court remark that that document, when proved, would be adverse indeed to any claim which might be brought by Neeaz Ali on the ancestral property, but proof of it is not essential to the support of a claim brought by the heirs of Moutaz Ali against Sooltan Ali. It is not necessary in the present action, Neeaz Ali not being a plaintiff, to determine the validity or invalidity of the *hibbehnamah*, but it may be observed incidentally, that the *khewut* papers drawn out in 1247 Fuslee, make mention of a *hibbehnamah* and of the allowance to Neeaz Ali in lieu of his share, and when to this it is added that Neeaz Ali has never been recognized at the Settlement, and that he himself allows that a pension was granted to him, the existence during the life-time of Nowazush Ali, and execution by him of an instrument similar in effect to the *hibbehnamah*, is scarcely open to question. The Principal Sudder Ameen has no authority whatever for asserting that Neeaz Ali admits the pension, because instructed to admit it by Sooltan Ali, and it was wholly beyond the province of the Principal Sudder Ameen to cast about him for impediments to a decree in favor of the plaintiffs, in the shape of possible claims, which are not advanced by distant collateral relatives. The share now demanded was held by Moutaz Ali up to the time of his death, which occurred within twelve years from the date of the suit; it was held by the heirs of Moutaz Ali for a short time after his death, until they were illegally ejected by Sooltan Ali. The title of the plaintiffs, therefore, to succeed to the share of Moutaz Ali under the general law of inheritance, is not to be resisted.

The Court, for the above reasons, reverse the judgment of the Principal Sudder Ameen, and pass a decree in favor of the plaintiffs.

The 14th July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 54 OF 1849. { Regular appeal from the decision of
Moulvee Abdool Azeez, Principal Sud-
der Ameen of Goruckpore, dated 23rd
December 1848.

MUNOO LALL, (Plaintiff), Appellant,
versus

NUNDKISHORE, KALEE PERSHAD AND OTHERS, (Defendants),
Respondents.

SUIT, for the recovery of Rs. 6,326-13-1½, *wasildt*, of a fourth of mouzah Purtappore and other mouzahs, forty-one in number, from the 2nd *kist* of 1243 Fuslee, to the end of 1247 Fuslee, with interest.

The particulars of this case are as follows. The two parties of the defendants belong to the same family, and derive their inheritance from their grandfather. The family remained united up to 1835; but disputes breaking out between them in that year, the defendant, Kalee Pershad, and his party executed a deed of sale for a third of their shares in the family estates to the plaintiff, Munoo Lall, on the 31st October 1835. The deed was registered on the 6th September of the following year, and on the same date, application was made by the sellers to the Revenue office for a *dakhil kharij*, or registry of the transfer. The registry was not given until the year 1839, when the interests of the several parties in the property were defined by the Collector on the occasion of the general Settlement, and the purchaser obtained possession. Plaintiff now brings his action to recover *wasildt*, from the date of his deed of purchase to the several dates of registry in 1839, from the sellers and the other party, Nundkishore; on the ground that they had jointly obstructed his possession, and were answerable to him for his share of the intermediate profits.

The two parties of the defendants answered separately. The defendant, Nundkishore, raised the plea of limitation, and urged in the second place, that the deed of sale being for a portion of a share which had not been defined, and which the sellers were not at the time in possession of, could not entitle the holder of it to profits, prior to the *dakhil kharij* of 1839. The defendant, Kalee Pershad, and his party followed the same line of pleading. They declared that they were not in possession at the time of the sale or at any period between that date and the dates of the *dakhil*

kharij, and further pleaded that by a counterpart agreement executed by the purchaser the sale was made a conditional one, and that a balance of the purchase money was still due to them.

The Principal Sudder Ameen did not record any distinct opinion on the limitation plea or on the assertion of the defendant Kalee Pershad, in regard to the non-payment of the price in full. He was of opinion, that the intermediate possession of the sellers was not shown, and that the sale transaction remained incomplete until the *dakhil kharij* of 1839, and holding the claim to be without foundation, he dismissed the suit.

In appeal the same pleas and arguments have been renewed on both sides. The plea of limitation must be at once rejected. The suit was brought on the 13th November 1847, and the period of the *wasildt* sued for is therefore included within the prescribed term. In respect to the merits, the Court consider the Principal Sudder Ameen to be in error in holding the completeness of the transaction between the sellers and buyer to depend in any way on the *dakhil kharij* of 1839. The only points for consideration between these parties are, whether the sellers were in possession of the thing sold, and whether the purchaser fulfilled his part of the sale contract, or not. The circumstance of the sellers, as joint holders of an undivided property, not having had their shares defined at the time of the sale will not affect the question, if it be shown that the shares when defined, covered the interests sold by them, and the principle, which awards back profits to a claimant by inheritance, on the establishment of his right to a distinct share, against the party who dispossessed him, will equally govern the decision on this claim. The Principal Sudder Ameen has grounded his finding in regard to the dispossession of the sellers simply on the fact that up to the year 1839, they were contesting their rights with Nundkishore. A directly opposite inference might fairly be drawn from this circumstance, and the appellant's documentary evidence is in the Court's opinion sufficient to prove, that the respondent, Kalee Pershad, and his party did maintain a joint possession with Nundkishore up to that year. The present denial of the defendants is in effect a pleading against the honesty of their own acts in the sale transaction, and does not deserve further notice. Their assertion in regard to the non-receipt of the price in full is in the Court's opinion equally unfounded. Direct evidence for or against this point has not been adduced by either party, and could hardly have been expected after so long an interval, but the formal registry of the deed in 1836 followed by the application on the part of the sellers for the *dakhil kharij*, establish a strong argument in favor of the full performance by the purchaser of his part of the contract by that date, and the Court consider that the same date

will fix the date of the claim for *wasildt* demandable. In regard to the counterpart agreement pleaded by the respondents, the Court find that after the institution of this suit it was rejected by a judicial decision in another suit between the same parties.

The same reasons will be of equal force in the case of the respondent Nundkishore. He has asserted throughout his possession and enjoyment of the profits singly up to the year 1839. The fact of a joint possession has now been found, and joint responsibility to the claim will necessarily follow, unless cause were shown for exemption, but so far from any special reasons being pleaded, the nature of the defence set up by the respondent, and the evident token which it affords of collusion with the other respondents, in order to defeat the claim, render him justly liable to a decree jointly with the other party. The Court consider that the appellant has established his claim against the respondents from the date of the application for *dakhil kharij* on the 6th September 1836, up to the several dates of the *dakhil kharij* in 1839, specified in the plaint. With regard to the *wasildt* account tendered in the lower Court, a general objection has been raised by the respondents, on the ground that complete *jummabundee* returns for the several years have not been filed, but the appellant has answered this objection satisfactorily by showing that the returns were not furnished to the Collector's Office before the year of the general Settlement, and it rested with the respondents to prove that the *jummabundee* for 1839, could not justly be assumed as the standard for the two years preceding, which they have failed to do. The appellant is not entitled to any interest up to the date of his suit in consideration of the delay in bringing it, and this portion of his claim is disallowed with reference to the decision of the Calcutta Court, 6th February 1836, Vol. VI.

A decree is accordingly given to the appellant in reversal of the decision of the lower Court for Rs. 2,372-12, and for interest from the date of suit to the date of realization, with proportionate costs.



The 14th July, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 123 OF 1851. { Special appeal from the decision of
 C. F. Thompson, Esq., Judge of Myn-
 poorie, dated 27th December 1850.

HURGOPAL, (*Defendant*), *Appellant*,

versus

BULBHUDDER PERSHAD, (*Plaintiff*), *Respondent*.

For the Judge's report of this case, see pages 77 and 78 of the printed decisions for zillah Mynpoorie for the past year.

A special appeal was admitted "to determine, whether the reasons of the Judge and Principal Sudder Ameen for refusing to recognize the proprietary right of the defendant in the *baghs* claimed by the plaintiff, are sufficient, or otherwise."

The Court cannot concur in the opinion expressed by the zillah Judge, in this case: the particulars of which are not quite correctly stated in the pleadings of the parties which speak of only *one* garden, of which the possession is disputed: whereas, it appears on reference to the defendant's *ikrarnamah*, that there are *two* gardens; viz., one comprizing 8 beegahs 8 biswahs, and the other 9 beegahs 3 biswahs. In the *ikrarnamah* taken from the defendant, by the Collector, on the occasion of the auction purchase, the first garden is distinguished by the words "Sewuk Teeka Ram, *kayeth, be tour lawaris*," the second, by the words "Bulbhudder Pershad, *kayeth, be tour lawaris*." Thus, it appears, indisputable, that the respondent, Bulbhudder Pershad was, at the time of the auction sale of the village, in actual *possession* of the two gardens: the Court cannot put any other construction on the fact of the respondent's name, and that of his deceased brother, Teeka Ram, being written opposite to them, although the additional words, "*be tour lawaris*," would seem to intimate some doubt as to the *right* of possession. Be this as it may, the Court hold, that the appellant, as auction purchaser of the "rights and interests" of the respondent is entitled to the possession of these two *baghs*, in common with all the other appurtenances of the *zemindaree*. The respondent by the act of sale, is divested of *every* interest theretofore enjoyed by him. The Court, accordingly, reverse the decisions of the Principal Sudder Ameen and Judge; and dismiss the plaintiff's suit with costs.

The 14th July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 124 OF 1851. { Special appeal from the decision of
F. P. Buller, Esq., Officiating Judge of
Furruckabad, dated 25th January 1851.

NURUNJUN SINGH, (Defendant), Appellant,

versus

PERSHAD SINGH, (Plaintiff), Respondent.

THIS case will be found reported at pages 9 and 10 of the printed decisions for zillah Furruckabad for the present year.

A special appeal was admitted "to determine, whether the reasons assigned by the Judge for decreeing in favor of the plaintiff's claim to the *bagh*, viz., that his separate possession, before the *butwarrah*, and ever since has been clearly proved, is sufficient."

The Court are of opinion that the decisions of the Moonsiff and Officiating Judge, in this case, are contrary to law, and cannot be sustained. It is admitted by the plaintiff, that a *butwarrah*, or division of the estate, has been effected by the Revenue Authorities in pursuance of a decree of the Civil Court by the defendants against the plaintiff; and, according to the partition, which has not been objected to, the *bagh* in question was allotted to the appellant. The distinction attempted to be made by the respondent between the *land* on which the *bagh* is situated and the *bagh itself* is absurd: with equal propriety might the right in the land on which grain is sown, be separated from the right to the produce. When a *butwarrah* is effected, the produce of the land follows the fate of the land itself; were a different rule to obtain, no partition of an estate could ever be effected. Regulation XIX. of 1814 does not exclude *baghs* from the general operation of the partition. The only exceptions made, will be found in Sections 9, 10 and 11, and these are stated to be dwelling houses, tanks, reservoirs, water-courses and places of worship. The Court, for the reasons above given, reverse the decisions of the lower Courts, and dismiss the plaintiff's suit with costs.

The 14th July, 1851.

Present : { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

CASE No. 74 of 1851. { Special appeal from the decision of
 G. F. Harvey, Esq., Officiating Judge of
 Cawnpore, dated 30th November 1850.

CHEYDEE LALL AND OTHERS, (*Defendants*), *Appellants*,
 versus

MUSSUMAT CHOONNYA AND OTHERS, (*Plaintiffs*), *Respondents*.

FOR the report of this case see pages 167 and 168 of the printed decisions for zillah Cawnpore for the past year.

A special appeal was admitted "to determine, whether the Judge was right in overruling the objection urged by the petitioners in their appeal to him founded on the omission of the name of the defendant Mussumat Soonder Koonwur, in the notice of foreclosure issued at the instance of the plaintiff."

The Court observe that the Officiating Judge seems to have misunderstood the nature of the objection made by the appellants. It is not urged by them that "in bringing the suit," there was an omission of the name of Mussumat Soonder Koonwur, and that the names of Jodabullee and Minheen Lall, infants and minors, were not inserted as such. The Judge goes on to say: "the difficulty of ascertaining who, among the children and women, ought or ought not, to have been made defendants, is great; all the principal defendants were impleaded, and the amendment made, subsequently, and properly." Reading the above it would naturally be supposed, that the omission of the name of Mussumat Soonder Koonwur had occurred in the petition of plaint, filed in the regular suit in the Sudder Ameen's Court, and in the *itilanamah* or notice issued therein to the defendants; but such is not the case. The petition of plaint and *itilanamah* are chargeable with no such defect. They are perfectly regular and correct. The error complained of by the appellants, is to be found in the notice served on the heirs of the original mortgager, at the instance of the mortgagee, under the provisions of Section 8, Regulation XVII. of 1806. In that notice the name of Soonder Koonwur, the widow of Sheo Buksh Rae, son of the original mortgager, and guardian of that person's infant sons, Jodabullee and Minheen Lall, was not entered. The notice was addressed to Cheydee Lall, Bustee Lall, Mohun Lall, Ishree Pershad, Ajoodheya Pershad, Girdharee Lall, and Behadoor Singh, *guardians of Jodabullee and Minheen Lall, minors*; now, it is quite

clear, that the abovenamed persons were *not* the guardians of the minors, but that their mother, Soonder Koonwur, fills that office, and is as such made a defendant in the Civil suit, consequently, the notice of foreclosure was incomplete and informal by the omission to give the prescribed notice to the *real* guardian of the minors. It further appears, that out of all the persons indicated in the notice, only *one*, Ishree Pershad, was actually served with it; the rest being reported as *non inventi*; upon which return being made, a proclamation was affixed at the Judge's cutcherry, and the residence of the parties. But the Court observe, that Section 8, Regulation XVII. of 1806, does not provide for the substitution of a proclamation, in lieu of an unserved notice, in such cases. The words of the law are: "The Judge, on receiving such written application, shall cause the mortgager, or his legal representative, to be furnished, as soon as possible with a copy of it, and shall, at the same time, notify to him, by a *perwannah* under his seal and official signature, that if he shall not redeem the property mortgaged, in the manner provided for by the foregoing Section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive." In this respect, therefore, there is another fatal error in the preliminary proceedings of the mortgagee, which vitiates his subsequent suit. It has been ruled by Construction No. 1140 that "if it was proved, that the notice was not duly issued to the mortgager, the plaintiff ought to be nonsuited, leaving him to apply for the issue of the prescribed notice," and there is a precedent of this Court, as

* Baboo Pershad Nurain,
Appellant,
versus
Sheikh Ahmud Ali and
others, respondents,
12th March 1845.

noted in the margin* quoted by the appellants, in which the rule laid down in the Construction referred to was enforced. In suits for foreclosure of conditional sales, the Courts are not at liberty to *infer* that the mortgagers or their representatives were *cognizant* of the mortgagee's proceedings. There must be proof of the actual serving of the notice, any deviation from the strictness of this rule, independently of its illegality would offer inducements to fraud on the part of mortgagees.

With reference to the foregoing observations, the Court reverse the decision of the Judge, and nonsuit the plaintiffs.

The 14th July, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 122 OF 1851. { Special appeal from the decision of Moulvee
 Mohumed Ruzzee-ood-deen Khan, Principal
 Sudder Ameen of Azimgurh, dated
 27th January 1851.

RAM BUKSH, (Defendant), Appellant,
 versus

KHOOSHAL AND BHAGEERUTH, (Plaintiffs), Respondents.

THIS was a suit to obtain separation of $2\frac{1}{2}$ biswahs, being half of a *thoke* of five biswahs of mouzah Roberee, and to obtain a proportionate share of the *shamilat*, and waste and unculturable lands of the entire village, the jumma being estimated at Rs. 275. Plaintiffs stated, that the tenure of the village was imperfect *putteedaree*, that it was divided into four *thokes*, one of the four being designated as that of Tej Singh and Ram Buksh, who were proprietors of equal shares therein. The rights and interests of Tej Singh having been put up to auction sale, in execution of a decree obtained by Dowlut Ram and Moohkun Singh; plaintiffs became the purchasers thereof, for the sum of Rs. 551, and obtained a deed of sale from the Collector, and possession. In consequence, however, of their $2\frac{1}{2}$ biswahs not being separated from the $2\frac{1}{2}$ biswahs of Ram Buksh, disputes frequently occurred, regarding the division of the profits and loss of the *thoke*. The building ground (*abadee*) tanks, waste and pasture of the entire village were, also, undivided. Plaintiffs accordingly sued to obtain a division of the lands of the *puttee*, and of the *shamilat* land, &c. of the entire mouzah.

The defendant, Ram Buksh, replied, that the suit of the plaintiffs was altogether groundless and vexatious, that the lands in the *thoke* are already divided, that the object of the plaintiffs is to deprive him of the possession of three wells, which defendant had constructed, in his own land, at a large outlay, and that plaintiffs have cut down the trees in a *bagh* planted by Tej Singh, which they could not have done, had the lands been in common.

The Moonsiff dismissed the suit, observing that the lands of each *thoke* were distinct, previously to the Settlement: that in the deed of sale obtained by plaintiffs, 127 beegahs 4 biswahs of land, with a jumma of Rs. 275, were specified as the share of Tej Singh, who is shown to have had possession of this much,

and no more, and plaintiffs admit having been put in possession of the same, and that any interference with possession is barred by lapse of time: that it is shown that the defendant Ram Buksh constructed wells on his own land, at a great expence, and that he would, consequently, be a sufferer by any new division: that from the evidence of the zemindar and putwarrees, it is clear, that Tej Singh and Ram Buksh's lands and *assamees* were quite distinct; and, therefore, plaintiffs cannot claim more than Tej Singh himself held.

The Principal Sudder Ameen reversed the Moonsiff's decision on the following grounds. He was of opinion, that plaintiffs were entitled to a division under the Regulations of Government, and that the defendant, Ram Buksh, had shown no good reason to the contrary. It is true he observes that plaintiffs have possession of 127 beegahs 4 biswahs; but that is *only cultivated* land. Plaintiffs are entitled to have a division of the *uncultivated* lands: that the fact of Ram Buksh having constructed wells in his land was no obstacle to a division: and that plaintiffs' vakeel disavowed any wish to interfere with the ownership of them.

A special appeal was admitted "to try whether the reasons assigned by the Principal Sudder Ameen for reversing the decision of the Moonsiff and decreeing in favor of the plaintiffs' claim to a division under the provisions of Regulation XIX. of 1814, are agreeable to law; also whether the plaintiffs can claim a larger portion of the *puttee* purchased by them than is specified in the deed of sale received by them from the Collector."

The Court are of opinion that the decision of the Moonsiff is correct, and that of the Principal Sudder Ameen erroneous.

It is quite clear, from an inspection of the record of this case, that the village is of the description designated *bhyachara*, and, as such, not liable to division, under the provisions of Regulation XIX. of 1814, the provisions of which are expressly declared by Section 30 of the Regulation to be "applicable to joint estates held in common tenancy, viz: where all the sharers have a common right and interest in the whole of the estate, *without any separate title to distinct lands or mehals forming part of the estate* held under one general assessment." The village, to which the present suit relates, does not fall within the above category.

In this, as in all other *bhyachara* villages, the putteedars have separate titles to distinct lands, and they have from time immemorial held separate possession, under those titles. To cause a division under the provisions of Regulation XIX. of 1814, would be manifestly unjust, and completely upset the tenure of all the lands in the village. In conducting the auction sale, every precaution appears to have been taken by the Revenue Authorities, to guard against such a contingency: the actual

quantity of land possessed by Tej Singh, and the proportion of the jumma assessed thereon, are both specified, the entry of the $2\frac{1}{4}$ biswahs was superfluous and only calculated to mislead the purchaser, *land not fractional parts of a beegah* being the index of rights in all *bhyachara* villages, the plaintiffs have no claim to more land than was specified in the sale advertizement. The Principal Sudder Ameen is mistaken in supposing, that the 127 beegahs and 4 biswahs of land entered, as belonging to Tej Singh, represent necessarily *only* the *cultivated* land. It is quite evident from an inspection of the *thoke puttee*, that there is *no* uncultivated land in this *puttee*. The entry, therefore, exhibits the *entire* separate possession of Tej Singh.

With reference to the foregoing remarks, the Court reverse the decision of the Principal Sudder Ameen, and revive that of the Moonsiff, by dismissing the plaintiffs' suit, with costs.

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The 21st July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 78 OF 1851. { *Special appeal from the decision of*
 Ruzzee-ood-deen Khan, Principal
 Sudder Ameen of Allygurh, dated
 • 31st July 1850.

GOMAN SINGH, (*Plaintiff*), *Appellant*,

versus

PUNCHUM SINGH AND OTHERS, (*Defendants*), *Respondents*.

THE plaintiff and the defendant, Punchum Singh, are brothers, sons of Futteh Singh, and nephews of Hirsook. Each has sued separately for a division of his share, said to be five biswahs, Sudha Ram, one of the defendants, resisted the claim on the ground that the entire share of the two brothers amounts to five biswahs only, and that he is himself proprietor of the other five biswahs included in the plaint.

It is contended by the plaintiff that his father and Hirsook were possessed of ten biswahs in the mouzah in equal shares, and that Hirsook divided the five biswahs belonging to him between the plaintiff and the plaintiff's brother, Punchum Singh. The plaintiff cites a deposition of Sudha Ram taken in 1827, in which Sudha Ram acknowledged that the plaintiff's father held ten biswahs jointly with Hirsook. And in a suit he brought in 1840 by the plaintiff conjointly with Sudha Ram, the right of

the plaintiff's father and of Hirsook, as proprietors of ten biswaha, is again admitted by Sudha Ram.

The Moonsiff decreed in the plaintiff's favor. The Principal Sudder Ameen reversed the decision of the Moonsiff on the ground that the alleged right of Hirsook had not been proved.

A special appeal was admitted to try, whether the Principal Sudder Ameen was justified in dismissing the claim of the plaintiff without adverting to the documentary evidence filed with the record, and which the plaintiff put into Court for the purpose of proving that Sudha Ram had formerly admitted the right now claimed.

The Court are of opinion, that the judgment of the Principal Sudder Ameen is chargeable with the defect noticed in the certificate. The Moonsiff on a consideration of the whole evidence adduced (the documentary evidence above referred to included) found the two brothers to be in proprietary possession of the ten biswaha, of which a partition is sought, and passed a decree in their favor in each case. The Principal Sudder Ameen, losing sight of the main point of proprietary possession, has treated the suit as a suit for inheritance, and has thrown out the claim of the brothers for the insufficient reason that the right of Hirsook (who is not living) has not been established. If the brothers are in possession as proprietors of ten biswaha, their title to effect a division of them is not questionable.

The Court remand the suit to the Principal Sudder Ameen for retrial, with reference to the foregoing observations.

The 21st July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 79 OF 1851. { *Special appeal from the decision of
Ruzzee-ood-deen Khan, Principal Sud-
der Ameen of Allygurh, dated 31st
July 1850.*

PUNCHUM SINGH, (*Plaintiff*), *Appellant,*

versus

GOMAN SINGH AND OTHERS, (*Defendants*), *Respondents.*

THE particulars of this case are to be found in case No. 78, decided this day. For the reasons given therein, the judgment of the Principal Sudder Ameen is annulled, and the suit is sent back to him for retrial.

The 21st July, 1851.

Present : { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 81 of 1851. { *Special appeal from the decision of
Doobé Jowala Pershad, Principal
Sudder Ameen of Azingurh, dated
11th September 1850.*

ZALIM SINGH AND OTHERS, (Defendants), Appellants,
versus

JANKEE SINGH AND OTHERS, (*Plaintiffs*), Respondents.

THE defendants, Zalim Singh and others, mortgaged, prior to the Settlement, twenty beegahs of land to Jankee Singh and others, and when the Settlement came on, Jankee Singh was admitted to engagements for the land so mortgaged, described in the Settlement record as twenty beegahs. The plaintiffs urge that the land, on measurement, has been found to consist of twenty-seven not twenty beegahs, and a suit is brought to alter the *shushmahee* papers in which, as in the Settlement *roobakaree*, the mortgaged property is specified as comprising twenty beegahs.

Simultaneously with the suit of Jankee Singh as above, a suit was preferred by Zalim Singh against Jankee Singh, for rent due on seven beegahs in excess of the quantity mortgaged, Zalim Singh and those associated with him being in proprietary possession of the whole mouzah with the exception of the mortgaged tract.

The Moonsiff dismissed the claim of Jankee Singh to alter the *shushmahee* papers, and decreed the claim of Zalim and others, to get rent from the seven beegahs.

The Principal Sudder Ameen reversed these decisions, decreeing the claim to alter the *shushmahee* papers, and dismissing the suit of Zalim Singh.

In the case of Zalim Singh and others, defendants, a special appeal was admitted to try, whether the Principal Sudder Ameen was justified in passing a decree in favor of the plaintiffs, their suit not having been brought to set aside the Settlement, but to set aside the *shushmahee* papers, and it appearing that if the suit had been brought to set the Settlement aside, the claim would have been barred by lapse of time.

In the case of Zalim Singh and others, plaintiffs, a special appeal was granted to try, whether with reference to the grounds

of special appeal in the case of Zalim Singh and others, defendants, appellants, the Principal Sudder Ameen should have dismissed the claim.

The Court hold that the suit of Jankee Singh and others, is barred by lapse of time. It has been laid down by a precedent of this Court, dated 9th April 1851, (Phenkoo Singh and others, *versus* Mundul Singh and others), that a suit brought to set aside the *shushmahee* papers is, whenever these papers are a transcript of the Settlement record, a suit to set aside the Settlement itself, and the claim of a plaintiff is not vitiated because he has omitted to sue, in precise words, for the alteration of the Settlement record. But whenever, as in the instance before the Court, a suit is brought to set aside the *shushmahee* papers which, if brought to set aside the Settlement would be beyond the legal limit for hearing, it is evident that the shape which the suit is made to assume is given to it merely for the purpose of evading the limitation law, and it must be rejected. The judgment of the Moonsiff, dismissing the claim of Jankee Singh was right, but on wrong grounds, the Moonsiff dismissed on the merits, whereas he should have rested his dismissal on the law of limitations. The Settlement having been made in 1836, a suit for reversal of the Settlement brought, as this has been, on the 7th February 1850 cannot be entertained. As respects the suit brought by Zalim Singh and others, it will follow from the above that they are entitled to a decree. The claim of Jankee Singh to obtain possession of seven beegahs, in excess of the land mortgaged and described in the Settlement *roobakaree* as twenty beegahs having been disallowed, there is no one to contest with Zalim and others, the right to levy rent on the seven beegahs.

The decisions passed by the Principal Sudder Ameen are reversed. The Court dismiss the claim of Jankee Singh and others, and pass a decree in their favor, in the suit brought by Zalim Singh and others.



The 21st July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 82 OF 1851. { Special appeal from the decision of Doobé
 Jowala Pershad, Principal Sudder
 Ameen of Azimgurh, dated 11th Sep-
 tember 1850. }

ZALIM SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
 versus

JANKEE SINGH AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this appeal are given in case No. 81, decided this day, as therein stated, and for the reasons therein stated, the Court decree in favor of the plaintiffs, reversing the judgment of the Principal Sudder Ameen.

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 The 21st July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 88 OF 1851. { Special appeal from the decision of J. P.
 Gubbins, Esq., Judge of Dehlie, dated
 2nd January 1851. }

ATTA-OOLLAH, (*Defendant*), *Appellant*,
 versus

GOWREE MULL AND MOKUND LALL, (*Plaintiffs*), *Respondents*.

THE particulars of this case are given in the volume of printed decisions for January last.

A special appeal was admitted to try, "whether it was competent to the Judge to amend the Moonsiff's decree so as to affect the appellant Atta-oollah, seeing that no appeal was preferred by the plaintiffs against the order of the Moonsiff exempting Atta-oollah from liability."

The Court find the decision of the Judge of Dehlie to be erroneous. It is the duty of judicial officers to confine themselves to the points at issue between the parties before them, and this rule has been inculcated by so many precedents of this Court, that it is quite unnecessary to particularize them. In the present instance, the plaintiffs did not appeal to the Judge

against the order of the Moonsiff exempting Atta-collah from liability; consequently, it was not within the competency of the Judge, on the trial of an appeal brought by the remaining defendants, to question the propriety of the order for exemption.

The decision of the Judge is set aside, and the appellant, Atta-collah, is released from liability in conformity to the decree of the Court of first instance.

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The 21st July, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 106 OF 1851. { Special appeal from the decision of Tus-
 suddooq Hoossein Khan, Principal Sud-
 der Ameen of Cawnpore, dated 16th
 September 1850.

DEVEE PERSHAD, (Plaintiff), Appellant,
 versus

CHEITA, (Defendant), Respondent.

IN this case the plaintiff claimed from the defendant Rs. 30 as rent due on the eight-anna *kist* of 1256 Fuslee, he founded his suit on the *jummabundee* of Settlement. The Moonsiff reduced the claim to Rs. 5-5-6. The Principal Sudder Ameen in appeal confirmed the Moonsiff's decision.

The plaintiff would appear to have succeeded as mortgagee to the possession of the land for which rent is claimed, the former holder having been Rajah Nerundurgir. It had been the custom of the Rajah to make a considerable abatement in his demand on the defendant for rent, whenever the rent was collected in kind. But it is admitted by the defendant that the *jummabundee* of Settlement fixed the rent payable by the defendant, at the amount now demanded.

A special appeal was admitted to try, whether it was competent to the lower Courts to make a deduction from the plaintiff's claim to rent on the grounds stated by them, in opposition to the *jummabundee* fixed at the Settlement.

It is obvious that the decisions of both the lower Courts are wrong. The voluntary relinquishment of any portion of his dues by the late holder cannot be binding on the present holder, it being an undisputed fact that the claim of the latter is in accordance with the Settlement *jummabundee*.

The judgments of the Courts below are reversed, and a decree is passed in the plaintiff's favor.

The 21st July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 49 OF 1850. { Regular appeal from the decision of
Moulvee Mohumed Hoossein Khan,
Principal Sudder Ameen of Mooradabad, dated 29th December 1849.

MOHUMED ALI, MOOZUFFER KHAN, MUSSUMAT AZEEZ-OOON-NISSA,
AND OTHERS, (*Defendants*), *Appellants*,

versus

MUSSUMAT UJAIB-OOON-NISSA, WIDOW OF BOONYAD ALI KHAN,
(*Plaintiff*), *Respondent*.

CASE No. 46 OF 1850.

MUSSUMAT UJAIB-OOON-NISSA, (*Plaintiff*), *Appellant*,

versus

MOHUMED ALI AND OTHERS, (*Defendants*), *Respondents*.

THE plaintiff brings her suit to recover Rs. 52,000, the amount of her dower. She states that she was the second wife, and that the marriage took place on the 11th Rujub, 1229 Hijree, when her dower was settled by verbal contract. She had lived with her husband until his decease, which occurred nine months before the institution of her suit, upon which the defendants took possession of the deceased's property amounting to Rs. 1,50,000, and refused to satisfy her claim.

Defendants made answer that thirty-five years had elapsed since the marriage, and that the suit was barred by limitation. They further pleaded that plaintiff's dower was fixed at Rs. 7,000, and that plaintiff had formally relinquished it to her husband afterwards, that she had lived apart from her husband for some time before his demise, and had not made declaration of any claim for dower, and that defendants did not occupy the position of heirs of the deceased, inasmuch as he had constituted the whole of his property *wuqf* before his decease, and had made it over to them under a regularly executed deed of trust or *towlecutnamah*, as *mootwullees* or trustees of the same.

Plaintiff in replication pleaded that limitation in cases of dower dated from the decease of the husband. She denied the relinquishment of her dower, and the fact of the assignment of the property by her husband for religious purposes, as well as the other statements of the defendants.

Defendants rejoined that there were two kinds of dower, one *moonijil* or payable immediately, another *moonuwijil* or ex-igible at a stipulated period, that plaintiff had not specified of which kind her dower was, and that without such specification the plaint was obscure.

The Principal Sudder Ameen rejected the limitation plea, and proceeding to the merits, first observed that the facts of the case, as set forth in the oral and documentary evidence, furnished ample tokens of the suit having been instigated by Nuzur Hoossein, a nephew of plaintiff's, who had abetted her in her quarrels with her husband during his life-time, and had prosecuted her interests in the suit. The judgment then proceeds to declare that the statement of the amount of dower in the plaint was not proved, and that for reasons drawn from the evidence which is entered upon in considerable detail, the witnesses were in the interests of the aforesaid Nuzur Hoossein. The evidence brought to prove that Rs. 52,000 was the rate of dower fixed by long usage in the families of the class to which plaintiff belonged was also rejected as inconclusive, but as the defendants had admitted that a dower of Rs. 7,000 had been settled upon her, and the evidence in proof of its relinquishment was devoid of credit, the Principal Sudder Ameen held that the sum of Rs. 7,000 was justly awardable. With respect to the *tolecutnamah*, the judgment was that it was proved, but that there was nothing in the terms of the deed to bar the realization of the dower from the proceeds of the assignment, and a decree was given accordingly.

From this judgment both parties have appealed, and their appeals may, with propriety, be considered together.

The Court overrule the plea of limitation, the specific objection advanced by defendants in their rejoinder has been revived by them in appeal, but being new matter not contained in their answer to the plaint, it cannot be admitted under the law of pleading in Section 5, Regulation III. of 1803. The judgment of the lower Court on the merits cannot in the opinion of the Court be maintained. The claim was for dower settled by verbal contract. The decree is founded on a contract and deed distinctly denied by the plaintiff. The lower Court could not find a fact at direct variance with the statement in the plaint, and yet make it the basis of a decree, and the decision of this Court in a parallel case No. 117, 6th September 1849, would alone be conclusive against such a finding. The evidence in the case exhibits much confident swearing to facts said to have occurred nearly thirty-six years before, but the Court concur with the Principal Sudder Ameen in declaring the evidence to the claim untrustworthy. The four principal witnesses admit

their immediate connexion with Nuzur Hoossein, either as relations or dependants, and their evidence, which is full of improbable relations, is wholly insufficient to establish the fact which they were called to prove. The copious documentary evidence which has been brought to show that this rate of dower was an unvarying one, and common to the family, has been met by counter evidence to the contrary fact, and in defect of direct proof is of no value. The Court further consider that there is sufficient proof of the execution of the *towlecutnamah*, but under their view of the insufficiency of the proof of the claim it would be needless to inquire whether the Principal Sudder Ameen has construed its terms correctly, and whether the trust deed does not of itself defeat the claim. The document is, however, of use in assisting the judgment with regard to the baselessness of the suit by shewing that although the deceased conveyed away the whole of his property in trust for religious uses in 1845, under circumstances which establish by strong presumption the fact of the plaintiff's cognizance, no objection was made, nor was any claim for dower set forth until 1847, by which time the parties of the husband and wife had broken out into open quarrels. The decision of the lower Court is reversed, and the suit is dismissed, with costs.

The 22nd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 75 OF 1851. { *Special appeal from the decision of*
 R. J. Tayler, Esq., Judge of Joun-
 pore, dated 19th August 1850.

SHEIKHBUBUR ALI, (*Defendant*), *Appellant*,
 versus

J. M. TRITTON, (*Plaintiff*), *Respondent.*

THE particulars of this case will be found at page 93 of the volume of the printed decisions of the Zillah Courts.

A special appeal was allowed to try, whether the Judge was right in giving the plaintiff a decree for damages, notwithstanding that he has not found that the defendant has rendered himself liable for damages.

The Judge has evidently misinterpreted the judgment of the Principal Sudder Ameen. The latter did not find the fact of obstruction by the defendant to the plaintiff's cultivation of in-

digo, or of damage done to the crop, but he found that of the land, which the defendant had stipulated to make over to the plaintiff, 30 beegahs 15 biswahs had not been made over, and he ruled (irregularly and improperly, for the point was not before him for trial), that the defendant should compensate the plaintiff for this deficiency by paying back at the rate of Rs. 5 per beegah, a portion of the rent which the defendant had received from the plaintiff in advance. The Judge observes, "I am of opinion, on looking over the papers that, as there were 30 beegahs 15 biswahs of land deficient, the plaintiff should be paid at the rate of Rs. 15 per beegah according to the conditions of the deed, for there was no agreement fixing Rs. 5 a beegah for injury and loss." Herein it is erroneously assumed that the Principal Sudder Ameen found the fact of damage, and the Judge, when he altered in favor of the plaintiff the Principal Sudder Ameen's decision, did not find that what the Principal Sudder Ameen had regarded as not amounting to a violation of the agreement did amount to a violation of it, but, unaware that the sum of Rs. 5 per beegah awarded by the lower Court had been awarded on account of refund of rent, not of damage, treated the subject as if it involved nothing more than an incorrect assessment of damages. It is for the Judge distinctly to decide whether the Principal Sudder Ameen was or was not right in his refusal to award damages, that is, whether the facts found establish the plaintiff's claim to damages on the ground of a violation of contract, in opposition to the finding of the Principal Sudder Ameen.

The suit is remanded to the Judge's file, that he retry it with reference to the above remarks.

— — — — —
The 23rd July, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 126 OF 1851. { *Special appeal from the decision of Rai*
 Doobé Jowola Pershad, Additional
 Principal Sudder Ameen of Azimgurh,
 dated 1st October 1850.

KUREEM BUKSH KHAN, (*Plaintiff*), *Appellant,*

versus

TULQEN SHAH AND WASIL KHAN, (*Defendants*), *Respondents.*

THIS WAS A suit to recover Rs. 113-4, on account of the rent of four beegahs of land No. 56 in the *khasrah*, cultivated by the

defendant Tulqeen Shah, in mouzah Caseepore, from 1251, to the four anna *kist* of 1257 Fuslee. Plaintiff stated, that he had purchased the rights and interests of Mussumat Amanut Beebee, in this mouzah, in execution of the decree of Gholam Ali Khan, decreeholder, and had obtained possession of the land, being 59—18 beegahs, as per numbers specified in the *khusrak*. The putwarree of the village in collusion with the defendant, Tulqeen Shah, had, in the half yearly papers of 1251, entered the land No. 56, as rent-free. Having in vain applied for redress to the Revenue Authorities, plaintiff was compelled to bring this suit. The defendant, Wasil Khan, was a sharer in the cultivation of the land with the other defendant.

The defendant, Tulqeen Shah replied, that he had, from time immemorial, held the land in question rent-free, and that the suit was barred by the law of limitation. If the Ameen had, in making the partition, erroneously designated the land as chargeable with rent, he, defendant, was not to suffer from this mistake; he denied that plaintiff had obtained possession, under the *butwarrah*, as asserted by him. Wasil Khan, defendant, stated, that it was immaterial to him to whom he paid rent: that he was ready to do so to whomsoever the Court might decree it; and prayed to be exempted from the costs of suit.

The Moonsiff, after visiting the spot and examining witnesses thereon, dismissed the plaintiff's suit, being of opinion, that the land had been for a long period, held rent-free by the defendant, Tulqeen Shah; and that the suit was barred by efflux of time. This decision was upheld by the Additional Principal Sudder Ameen in appeal.

A special appeal was admitted to try, "whether the lower Courts have not acted illegally, in trying this suit, without referring the same to the Collector for report, and whether the Moonsiff ought not to have rejected the claim as not cognizable by him."

Without going into the merits of the case, the Court observe, that the proceedings of the lower Courts are vitiated by two errors. The Moonsiff was incompetent to try the case at all, as it involved the question of the possession of rent-free land; and the decision of such cases by Moonsiffs is prohibited by Clause 3, Section 5, Regulation V. of 1831. He should either have nonsuited the plaintiff, or have stayed proceedings, and applied for instructions to the zillah Judge. On the other hand, the proceedings of the Principal Sudder Ameen are equally irregular; as he was not competent to take up the case in appeal, from the decision of the Moonsiff, seeing that the latter officer had no *original* jurisdiction. Further, supposing the case to have been irregularly instituted before the Principal Sudder Ameen, he

should have referred it to the Collector, for report, previously to passing a decision. The Court, accordingly, annul the decisions of the Moonsiff and Principal Sudder Ameen, and as the most indulgent course, direct the Moonsiff to apply to the Judge for permission, to forward the case either to that Officer, or to the Principal Sudder Ameen, to be dealt with as an *original* suit, in one of those Courts.

The 23rd July, 1851.

Present : { A. W. BEGHIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 137 of 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Judge of Meerut,
 dated 24th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

AWUZ KHAN, (*Defendant*), *Respondent.*

THE particulars of this suit have been fully set forth in the Judge's decision. The plaintiff, dissatisfied with the summary judgment of the Revenue Court, instituted a regular suit in the Moonsiff's Court for its reversal. The suit involved two points of fact, viz., 1st, the liability of the cultivator to the payment of a varying rent by appraisement of the crops, and 2ndly, the fact of whether any payments for rent had been made by the defendant. The Moonsiff entered into the first point in considerable detail, and decided in favor of the plaintiff. The second point was also decided in his favor, and a decree was given, which was reversed in appeal.

A special appeal was admitted to try, 1st, whether the Judge had sufficiently considered and disposed of the reasons in the Moonsiff's decree, which his judgment reverses, and 2nd, whether the Judge's decision is not imperfect, inasmuch as he has omitted to decide the plea of payment alleged by the respondent, and denied by the appellant.

The Court consider the decision defective for the reasons stated in the certificate. With regard to the first point, the Judge observes, "The decision of the Deputy Collector is to the contrary, and the collection of rents on a rate of Rs. 20 per cent. in excess of the assessment, which it authorized, was sanctioned and continued in appeal by the Commissioner and Sudder Board of Revenue, and I see no reason for deciding in opposi-

tion to those authorities; if, indeed, there were reasons for doing so, the suit in its present form would not admit of it." In advertence to the last remark, the Court observe, that the suit has not been brought to establish a right to collect rents by a new method. It rests on the alleged right of the malgoozar to receive rent from the cultivators at the rate, and on the system fixed at the Settlement and in force since, and as the suit has been brought under the terms of the Section 10, Regulation XIV. of 1824, to obtain "a more full and formal investigation of the merits of the case" than was given to it in the summary judgment, the conclusion of the Revenue Court, which the plaintiff has brought his suit to contest, is not singly sufficient as a ground for decision without a due examination of the merits, and of the reasons in the Moonsiff's judgment. The remaining reasons in the Judge's decision are rather objections to the *jummabundee* itself than arguments against the custom of collection on which the *jummabundee* has been framed, and in the event of the custom being judicially settled, may be considered in modification of the claim decreed by the lower Court. The remand of the case will afford the Judge an opportunity of considering at the same time, whether the respondent after the transfer of his *putteedaree* rights to the appellant can claim a more favorable rate of rent than the other cultivators, and also whether the cultivators by the removal of the crops did not render themselves liable to the payment of cash rents as rated in the *jummabundee*. These or other objections to the *jummabundee* that present themselves might form a subject for a more extended investigation, but are not valid as reasons for its entire rejection. The decision as it stands is moreover imperfect, for the second reason noted in the certificate, no judgment having been given on the point of whether the respondent has established the payment of rent on a fixed money rate for the *kkurreef* season of 1256 Fuslee, as alleged by him.

The Court annul the decision, and remand the case to the Judge for replacement on his file and decision *de novo* in advertence to the foregoing remarks. The costs as usual.

The 23rd July, 1851.

Present : { A. W. BEGGIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 138 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851

GUNGA DASS, (*Plaintiff*), *Appellant,*

versus

ROOSTUM, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGGIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 139 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*

versus

NUBEE BUKSH, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851,

Present : { A. W. BEGGIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 140 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*

versus

LALJEE, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 141 of 1851. { *Special appeal from the decision of*
C. C. Jackson, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

DHURMEE, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 142 of 1851. { *Special appeal from the decision of*
C. C. Jackson, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

MUNSOOKH AND OTHERS, (*Defendants*), *Respondents.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 143 of 1851. { *Special appeal from the decision of*
C. C. Jackson, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

NUSROO, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 144 OF 1851. { *Special appeal from the decision of*
C. C. JACKSON, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

JAY KISHEN, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 145 OF 1851. { *Special appeal from the decision of*
C. C. JACKSON, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

MAHASOOKH, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 146 OF 1851. { *Special appeal from the decision of*
C. C. JACKSON, Esq., *Officiating Judge*
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

MOHUMED BUKSH, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 147 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

GOOLAM HOOSSEIN, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 148 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

NOOR KHAN, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present: { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 149 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

ZAHURYA, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 150 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

ODMEE, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 151 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

KIDDA, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 152 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

IMAM BURSH, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 153 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., *Officiating Judge*
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

KULLOO, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 154 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., *Officiating Judge*
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

BADUL KHAN, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } Judges,
 H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 155 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., *Officiating Judge*
 of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant*,
 versus

PEER BUKSH, (*Defendant*), *Respondent*.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 156 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (Plaintiff), Appellant,
 versus

BHAGA, (Defendant), Respondent.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 157 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (Plaintiff), Appellant,
 versus

JEESOOKH, (Defendant), Respondent.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 158 OF 1851. { *Special appeal from the decision of*
 C. C. Jackson, Esq., Officiating Judge
 of Meerut, dated 25th January 1851.

GUNGA DASS, (Plaintiff), Appellant,
 versus

DULEEL, (Defendant), Respondent.

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 159 OF 1851. { *Special appeal from the decision of*
C. C. Jackson, Esq., Officiating Judge
of Meerut, dated 25th January 1851.

GUNGA DASS, (*Plaintiff*), *Appellant,*
versus

MUSSUMAT MUHTABY, (*Defendant*), *Respondent.*

THE order of remand the same as in the case No. 137.

The 23rd July, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 59 OF 1851. { *Regular appeal from the decision of*
Mohumed Villayet Ali Khan, Princi-
pal Sudder Ameen of Allahabad,
dated 14th January 1851.

RAJAH CHITPAL SINGH, (*Defendant*), *Appellant,*
versus

MOOZUFFER HOOSSEIN KHAN, (*Plaintiff*), *Respondent.*

THE suit is brought to recover a loan of Rs. 1,00,000, advanced on mortgage, under an award of private arbitration, dated the 12th December 1849. The loan, it appears, was secured by three separate instruments, executed by the defendant, which conveyed a mortgage interest in the form of a conditional sale with possession of certain estates, and comprised other conditions which in time gave rise to law-suits between the parties. Ultimately, on the recommendation of the Officiating Judge of Allahabad, they consented to refer their respective claims to private arbitration, and agreements to that effect were taken from them, conveying full power to the arbitrator chosen by them to dispose of all claims, of every description arising from the transaction, that were then pending or might afterwards be advanced. This agreement was followed by another of ten days' later date, by which each party binds himself to abide by the arbitrator's decision on the claims contained in the Schedule

then submitted. The arbitrator proceeded accordingly to dispose of the conflicting claims of both parties, and after an interval of more than a year, recorded a separate award for the release of the mortgage itself. The award directed that the mortgager, Rajah Chitpal Singh, should repay the loan, and that the estates should be surrendered to him by the mortgagee, who has now brought his action under it.

The defendant in his answer, amongst other arguments, denied that the terms of the arbitration agreements empowered the arbitrator to take up and decide this matter, and he pleaded that the award was consequently of no force.

The Principal Sudder Ameem was of opinion that the arbitration agreements conferred the requisite authority to decide the question, but did not assign any particular reasons for his conclusion, and considering the award to be a valid document, he decreed the suit.

The Court, after an attentive examination of the two agreements, are unable to concur in this decision. They observe that although the terms of the original agreement were unusually comprehensive in committing all pending claims, and all that might arise thereafter in any way connected with the mortgage transaction to the decision of the arbitrator, without reservation, the intent of the supplemental agreement must be understood as limiting the power of arbitration to the several claims contained in the Schedules given in by each party. It is clear that the object of the second agreement was to reduce the general terms of the first to a definite form from the proviso which it contains that any claim of which proof shall not have been adduced up to a date fixed shall be rejected. The cancelment of the mortgage had not been discussed by either party up to that time, nor was it brought before the arbitrator until long after. The arbitrator, no doubt, acted in good faith, and misled by the terms of the original agreement considered himself authorized to extend his decision to this matter also, but the Court are of opinion that if the extension of the arbitration to any matters not in the Schedule were desired or deemed necessary, fresh agreements should have been taken from the parties, and that without these the award cannot be held valid as a ground of suit. This is the only point that presents itself for decision in the case; and the rejection of the award will necessarily be fatal to the suit in its present form. The Court accordingly reverse the decision of the Principal Sudder Ameem, and nonsuit the respondent, with costs.

The 26th July, 1851.

Present : A. W. BEGBIE, Judge.

CASE No. 121 of 1850.

Regular appeal from the decision of
Moulvee Mohamed Abdoor Ruhman
Khan, Officiating Principal Sudder
Ameen of Benares, dated 22nd April
1850.

CHITUMBURNATH KOOMAR SAMEE, (*Defendant*), *Appellant*,
versus

THAKOOR HURSURN SINGH, *mookhtear* OF MAHARAJAH ISHREE-
PERSHAD NARAIN SINGH, (*Plaintiff*), *Respondent*.

THE plaintiff sues the appellant and Hunooman Pershad Singh, defendant, to recover possession of a *baráduree*, with the ground attached to it, situate in the mohullah Sonarpoora of the city of Benares, value Rs. 6,100, by virtue of a mortgage held by him, under date 8th October 1821, and for Rs. 1,300 being the amount of rent of the said building from 26th March 1838, the date of his dispossession, to the date of the institution of his suit. The plaintiff states his case as follows: Baboo Hunooman Pershad Singh mortgaged the premises in question, on the date above specified, for the sum of Rs. 15,000, to Maharajah Oodut Narain Singh, deceased, plaintiff's predecessor, for the period of twenty years, the deed being drawn out in the name of Ajeet Singh, *gomashta* of the then Maharajah: possession was given and enjoyed by the latter without any interruption till 1831, when, in execution of a decree, obtained by Dabee Dial Singh and Pertab Narain Singh against Bence Dutt Singh, the latter named the defendant, Hunooman Pershad, as his security, whose property, consisting of houses in mohullah Sonarpoora, were accordingly entered in the Schedule annexed to the security bond, and was attached by order of the Sudder Dewanny Adawlut. This part of the plaintiff's statement is not at all clear; but it would appear, to be his meaning, that when the attachment of Hunooman Pershad's property was made, the *baráduree* was included in it; and that when it was taken off, the defendant, Chitumburnath's predecessor, Ayarub Koomar managed, in collusion with the Nazir of the Judge's Court, to obtain possession of the *baráduree*, by virtue of a deed of mortgage, executed in his favor by the defendant, Hunooman Pershad. The plaintiff petitioned the Judge repeatedly, but without success, to recover possession of the *baráduree*: and was consequently, compelled to institute the present suit. In support of his title, the plaintiff produced two previous mortgage deeds, for the same

property, of dates antecedent to his own, which had been made over to him by the previous incumbents. The fact of this property having been mortgaged since 1796 is sufficient to invalidate the mortgage deed under which the defendant, Chitumburnath, claims possession, which is dated in 1819. If the defendant's title were good, the previous title deeds would have been made over to him.

The defendant, Chitumburnath replied, that it was evident from plaintiff's statement, that the alleged mortgage deed of 1821, under which he claimed possession of the *baráduree*, had no existence; that even if it had, there was no proof that the Rajah was entitled to sue on a deed executed in favor of Ajeet Singh; that the amount of rent claimed by the plaintiff was exaggerated; that if, as stated by the plaintiff, he was in possession up to the end of 1837, why does he claim rent only from 26th March 1838? that on the *baráduree* being attached, in the case of Gungotegir, plaintiff, *versus* Hunooman Pershad, defendant, and again in the case of Rajah Oodut Narain Singh, plaintiff, *versus* the same defendant, Ayarub Koomar Samee, (defendant's predecessor) appeared, as objector, under the mortgage deed of 1819, and a deed of sale dated 9th October 1837, when Hunooman Pershad acknowledged the sale; and, after a summary inquiry, the property was released to the objector, in preference to the claim preferred by the Rajah: that it is absurd to suppose, that if the Rajah held the *baráduree* in mortgage he would have caused it to be attached, in execution of his own decree, and that in the summary inquiry, made in execution of the decree of Dabee Dial Singh and Pertab Narain Singh, plaintiffs, *versus* Bence Dutt Singh, defendant, it was proved that defendant was in possession of the *baráduree* in 1837, under his mortgage deed.

The defendant, Hunooman Pershad Singh, in his reply, admitted that he had executed the mortgage deed in favor of plaintiff in 1821: but alleged, that the transaction was never completed, because the Rajah's predecessor had not fulfilled its stipulations, and that the defendant's predecessor Ayarub Koomar, had held possession, under the mortgage of 1819, till the 9th October 1837, when he, Hunooman Pershad, sold the property to the said Ayarub Koomar. In short this defendant contradicted the statement of the plaintiff in every material point, and supported that of the other defendant, Chitumburnath. Subsequently, when the case came to a final hearing, Hunooman Pershad retracted all that he had stated in his *jawab dawa*, alleging that it had been fraudulently given in by his *mookhtearkar* without his knowledge or consent, and in collusion with the defendant Chitumburnath. He now admitted the truth of the plaintiff's statement; and affirmed, that the latter had held possession of the *baráduree* under the

mortgage deed of 1821, in common with the rest of the property therein specified.

The Principal Sudder Ameen decreed in favor of the plaintiff's claim. He was of opinion, that the mortgage deed, produced by the plaintiff, was genuine, both it and the receipt of Hunooman Pershad for the consideration, having been duly registered: a fact incompatible with the assertion of the defendant Chitumburnath of its being a forgery, this view was supported by the subsequent statement of the defendant Hunooman Pershad, and the evidence of plaintiff's witnesses, and it was proved, that the plaintiff was, up to this time, in possession of the rest of the property specified in the mortgage deed; the plaintiff was clearly entitled, also, to the amount of rent claimed by him for the period of his dispossession, it being shown, that the *barāduree* had yielded this rent, and the defendant Chitumburnath, although he asserts in general terms, that plaintiff has over-estimated the rent, does not specify any other sum as the proper one. The Principal Sudder Ameen believes that, in the confusion arising out of the claims of the several objectors at the time of the attachment, the defendant's predecessor, Ayarub Koomar, by some trickery managed to get possession of the building; and, then, to strengthen his case, fabricated the mortgage deed now produced by him. Until so unexceptionable a deed, as that in possession of plaintiff, is satisfied, neither of the defendants can have any claim to possession. It is not at all improbable, that the *first* reply of the defendant, Hunooman Pershad, was fraudulently given in, without that person's knowledge. Moreover, it is worthy of remark, that the defendant, Chitumburnath, has not produced the *original* of the mortgage deed of 1819, under which he affirms, that he obtained possession; nor has he produced any evidence to establish its execution. His predecessor Ayarub Koomar did not even make any mention of it, when he appeared, as oozurdar in the case of Gungote-gir, an omission altogether irreconcilable with the supposition of such a deed being then in existence. Neither, has the defendant produced the *original* of the deed of sale, said to have been executed in 1837, or produced any evidence in proof of it. When the case was ripe for decision, the defendant's vakeel produced *copies* of the mortgage deed, and deed of sale, alleging that the *originals* had been lost: a statement not entitled to belief. The probability is, that he was afraid to produce the originals from a fear that they should be declared to be forgeries. The recognition of the defendant's possession, in the summary enquiry cannot be regarded as a sufficient proof of his possession, as these summary enquiries are neces-

sarily superficial, and unsatisfactory. It was incumbent on the defendant to make good his title, in the present *regular* investigation; and to produce his documentary evidence; which he has not done. On the oral testimony adduced by the defendant to prove the fact of his possession, the Principal Sudder Ameen can place no reliance, for such testimony is of little value unless supported by documentary evidence; and the facility of obtaining oral testimony on any subject is a matter of notoriety. The Principal Sudder Ameen desires it to be understood, that he does not pronounce any opinion as to the genuineness or otherwise of the *deed of sale* of 1837, filed by the defendant Chitumburnath, the claim of the plaintiff depending on the non-existence of the mortgage deed of 1819, asserted by the defendant, but as to the falsity of which no doubt can be entertained.

The defendant, Chitumburnath, being dissatisfied with this decision, appealed therefrom to this Court. The defendant, Hunooman Pershad Singh, did not appeal.

After an attentive consideration of the proceedings in this case, I am perfectly satisfied of the justice of the Principal Sudder Ameen's decision. I have little to add to the very strong and convincing arguments which he has arrayed in support of his judgment. I must remark, however, that the assertion of the appellant, that the plaintiff attached this *baráduree* in execution of his own decree against the defendant Hunooman Pershad, is *untrue*. A *roobakaree* of the Judge of Benares, under date 30th June 1838, is filed by the appellant, with the view of establishing this allegation, which, if *true*, would indeed be a very strong argument against the fact of the Rajah's possession under his mortgage. But there is nothing in this *roobakaree* to show, that the *baráduree* was attached by the Rajah. The attachment made by the Rajah, evidently, was of *other* property belonging to Hunooman Pershad, not included in his mortgage. That the fact being as stated by the defendant, it might easily have been proved, by the production of a copy of the order of attachment. I am fully satisfied, from the evidence adduced by the plaintiff, that his predecessor was in possession of the *baráduree*, under his mortgage deed of 1821, and that he was ejected from it, as stated by him, by a trick on the part of Ayarub Koomar, with the assistance of the Nazir of the Judge's Court. The order given by the Judge to place *any* party in possession, on the removal of the attachment; and the local inquiry made by the Nazir, in consequence of that order, were irregular. The effect of an attachment is not to *dispossess* any person, consequently, the *restoration to possession* is a work of supererogation, and it is this irregular interference which has given rise to the present suit.

I dismiss the appeal with costs.

The 29th July, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 131 OF 1851. { *Special appeal from the decision of*
C. C. Jackson, Esq., *Officiating Judge*
of Meerut, dated 24th December 1850.

GHEESUN AND OTHERS, (*Defendants*), *Appellants,*
versus

BEHADUR SINGH, (*Plaintiff*), *Respondent.*

THE particulars of this case will be found at pages 195 to 197 of the printed reports of decisions of Zillah Meerut of the past year.

A special appeal was granted to determine, "1st, whether the plaintiff's suit should not have been dismissed, as being opposed to the provisions of Section 10, Regulation II. of 1803. 2nd, whether the decisions of the Zillah Courts are not erroneous, inasmuch as they have decreed contrary to plaintiff's claim."

With regard to the first point noted in the certificate, the Court, on full consideration of the terms on which the petition of plaint is couched, are disposed to regard the plaintiff's repetition of the claim "to establish his title for five biswahs of mouzah Suleempore," rather as an error of expression, than as a deliberate attempt to bring again under adjudication a matter which had already been decided by the previous decree obtained by him on the 13th April 1839. On taking out execution of that decree it was found, that certain parties, who had not been made defendants in the suit, were in possession of a portion of the five biswahs decreed, and could not be dispossessed under it; the plaintiff, therefore, expressed his readiness to accept execution of his decree to the extent that was practicable; and his intention to bring a separate suit for the remainder of the five biswahs mortgaged to him. The Judge is incorrect in stating, that the former Judge gave an order to that effect, to the plaintiff. The Judge did nothing of the sort. It was not within his province to give such an order, or recommendation. The present suit is that which the plaintiff contemplated; but he has mixed up with it the claim to a partition of five biswahs of the entire village, the propriety of which course is open to question. The Court forbear, therefore, to interfere with the decision of the lower Courts, on the ground which forms the first point in the certificate of special appeal. But the objection noticed in the second point of the certificate cannot be got over. The plaintiff sued for a division of five biswahs; or, in other words, to obtain separate posses-

sion of 1-4th of the cultivated lands of the *puttee* of sixteen *biswahs*; and of 1-4th of the uncultivated land of the *entire village*. But the Moonsiff has given the plaintiff a decree for 1-4th of the cultivated and uncultivated land comprised in the *puttee* of sixteen *biswahs only*: the effect of which decree would necessarily be, to leave the proprietors of the four-*biswah puttee* in undisturbed possession of their present holdings, in the *shamilat* land; while both the plaintiff and defendants will be endamaged by the restriction of the division of the *shamilat* lands to the sixteen-*biswah puttee*: the plaintiff will obtain less than he sued for, and which it is apparently the object of the decree to give him; and after giving him this portion, the remaining proprietors of the sixteen-*biswah puttee* will have less remaining in their possession, than they would have, were the division to be made of the whole of the *shamilat* land of the village. Moreover the Court are inclined to think that, under the peculiar tenure of the village, the execution of this part of the lower Court's decision would be found altogether impracticable, and it is absolutely necessary that this defect, arising from the misapprehension of the Moonsiff, which has escaped the notice of the Judge, should be rectified, and with this view, the suit is remanded to the Court of first instance. The Court have found considerable difficulty in dealing with this case, in consequence of the ambiguous and indistinct phraseology of the petition of plaint; and which affords some excuse for the mistake now noticed in the lower Court's decision. In remanding the case, the Court desire, that the *zillah* judicial functionaries will bear in mind the Construction No. 1073, and consider the whole case re-opened for their consideration.

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The 27th July, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 152 OF 1849. { Regular appeal from the decision of Mr.
J. Mercer, Principal Sudder Ameen
of Furruckabad, dated 9th May
1849.

GIRDHARE LALL, (*Plaintiff*), Appellant,
versus

JOGRAJ, (*Defendant*), Respondent.

THE plaintiff sued to recover Rs. 11,683-5-6, joint principal and interest of a sum realized under a decree in a suit against

Nuwab Hussun Ali Khan; and to recover Rs. 3,931-11-9, interest on the above sum.

Two appeals are preferred to this Court; one by the plaintiff, against the order of the Principal Sudder Ameen disallowing a portion of his claim; another by the defendant, against the decision generally.

The plaintiff states, that he and his brother brought a suit against Nuwab Hussun Ali Khan, and applied for an attachment of the Nuwab's property, submitting a schedule of it. It so happened that the defendant was engaged at the same time in carrying on a suit against the Nuwab for possession of certain mortgaged property, and for recovery of interest during the period of his dispossession of it. The defendant, as well as the plaintiff, moved the Court to attach the property of the Nuwab. It was agreed that, as the claim of each party amounted to about Rs. 14,000, the proceeds of the attached property should be divided, after decrees had been obtained and executed, between the two suitors. On the 25th February 1843, Jograj applied for attachment of the property; the Principal Sudder Ameen intimated to him, that what he desired to attach, indeed rather more than what was contained in his list, had been attached already in the suit of Girdharee Lall, who had consequently a prior claim. The defendant, Jograj, suggested that an *ikrarnamah* be taken from the Nuwab binding him not to alienate the attached property; and in the *roobakaree* drawn up on the occasion by the Principal Sudder Ameen, the agreement into which the parties had entered, as explained above, was duly noted. The two suits progressed, and, ended in decrees in favor of the two plaintiffs. Jograj brought to sale the larger portion of the property, and purchased it himself, putting in receipts for what he had so purchased. The plaintiff applied for his share of the money realized, according to the terms of the agreement, but as there existed at that time disputes with other decreeholders, and it was not known what amount would be rateably divisible, the defendant proposed, and the plaintiff consented, to defer a settlement till the final adjustment of the matters in dispute. In 1847, the final adjustment was made, under the order of the Sudder Court, and the sum which came to Jograj amounted to Rs. 23,304-5. The plaintiff, Girdharee Lall, claimed half of this sum, and the defendant offered the plaintiff half of the *property* he had purchased, affecting to read the agreement in this sense, and insisting further on other deductions from the plaintiff's demand which the agreement had not contemplated, viz., a deduction of the whole sum recovered by Jograj as interest, to which he set up an exclusive right, and a deduction for costs incurred in giving effect to the decree. To the offer to divide the *property*, the plaintiff would

by no means assent, as it was altogether opposed to the spirit of their bargain, and a similar objection was taken to the other propositions respecting the money recovered as interest, and the costs. The plaintiff now brings a regular suit to recover half the *money* realized by the sale of the Nuwab's property, as provided in the contract between himself and Jograj, together with interest on the same from the date on which Jograj purchased the property.

It is answered by the defendant that the *roobakaree* of 25th February 1843, contains no mention of the *value* of property sold; that the plaintiff has only himself to blame for his want of energy; and as he did not take the requisite steps to realize from the property all he might have realized, he cannot, with reference to the Circular Order of 15th February 1844, come into Court with any claim whatever against the defendant. The application of the plaintiff was rejected, it is pleaded, in the Miscellaneous Department, and if dissatisfied with that order, plaintiff should have appealed it. The agreement is explained by the defendant to mean that any claim advanced by the plaintiff shall be tenable only on proof of his strenuous exertion to recover all he could from the attached property, and it is contended that the plaintiff's remissness and oscitancy have put it out of his power to sue.

The Principal Sudder Ameen accepted the plaintiff's construction of the agreement, and adjudged him entitled to half the money realized under the sale affected by Jograj, not however, without a deduction from the plaintiff's claim of two separate items, one amounting to Rs. 3,098-6-7½, the other to Rs. 312-2, on the ground that the plaintiff's inactivity has entailed on the defendant a loss commensurate with that amount. The Principal Sudder Ameen further deducted from the claim an item of Rs. 28-5, on account of plaintiff's share of costs, and he disallowed the whole of the interest sought to be recovered prior to the date on which the rateable division ordered by the Sudder Court had effect.

The Court are of opinion that the Principal Sudder Ameen has rightly interpreted the agreement between the parties, and that it must be taken to refer to the *proceeds* of such portions of the attached property as might be brought to sale. When the agreement was made, the purchase of the property by either party was evidently not contemplated, and if either party thought fit to buy the property, that circumstance could not implicate the other in the transaction, or in any way detract from or modify the right of the other under the express terms of the contract. The Court further agree with the Principal Sudder Ameen in thinking that the share of costs incurred by Jograj in contesting the division with the other decreeholders, should be allowed

to Jograj, and also that he should not be made liable for any amount of interest prior to the date on which the final division of the assets was made. Had a stranger become the purchaser, Jograj would not, even constructively, have had the money to make over to the plaintiff, until the final adjustment of disputes with the other decreeholders, and it does not at all affect the question that Jograj, happening to become the purchaser, was constructively in possession of the money, because, according to usual practice, he put into Court receipts for the amount of the sale price. It may be remarked too, that this demand for interest is at variance with the plaintiff's own statement in his petition of plaint, for he therein distinctly allows that he consented to await a division of assets. So far the judgment of the Principal Sudder Ameen is upheld. The Court differ from the Principal Sudder Ameen as respects the deductions made on the ground of the plaintiff's want of vigour in preferring his claims on the attached property, since the agreement does not annex any penalty to negligence or indolence, on whichever side manifested, but clearly leaves it to be understood that of the whole sum realized, be it what it may, half shall be assigned to one party, and half to the other. This objection on the score of the plaintiff's negligence forms a new plea, and if it were a sound objection, it is most improbable that it should not have occurred to the defendant, when, in 1847, he refused to divide *money*, but expressed his readiness to divide *property*, under certain reservations. The *roobakaree* of Court dated 22nd June 1847, which is filed with the record, followed the order for a rateable division, and it shows that it was not in virtue of any such objection as is now raised, that the defendant disputed the plaintiff's demand.

The decision of the lower Court is altered in favor of the plaintiff as explained in the foregoing remarks.



The 29th July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 165 OF 1849. { *Regular appeal from the decision of
 Mr. J. Mercer, Principal Sudder
 Ameen of Furruckabad, dated 9th
 May 1849.*

JOGRAJ, (*Defendant*), *Appellant*,
 versus

GIRDHAREE LALL, (*Plaintiff*), *Respondent*.

THE particulars of this case are given in case No. 152 decided this day. For the reasons therein assigned, the appeal is dismissed.

The 29th July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 110 OF 1851. { *Special appeal from the decision of Doobé
 Jowala Pershad, Principal Sudder
 Ameen of Azimgurh, dated 11th
 December 1850.*

SURNAM SINGH AND OTHERS, (*Defendants*), *Appellants*,
 versus

JESREE SINGH AND OTHERS, (*Plaintiffs*), *Respondents*.

THE plaintiffs in this action lay claim to a 2-anna 8-pie share or one-sixth of the entire mouzabs of Indrowlee, ~~Munbaroo~~ ^{Mulbaroo}, ~~Godeppore~~ ^{Godeppore}, and ~~Mahmudpore~~ ^{Mahmudpore}, pleading that the above share devolves on them by inheritance. They assert that they were in possession till 1253 Fuslee Sumbut, when the Settlement Officer ejected them.

It is urged in defence that the claim being founded on inheritance, and the plaintiffs having sued formerly for the share accruing to them from the common ancestor Luchmun Singh, the plaintiffs cannot renew a claim for a part of the property of Luchmun Singh, inasmuch as it should have been included in their previous suit.

Both the lower Courts found the fact of possession up to the Settlement, as pleaded by the plaintiffs, and decreed the claim.

A special appeal was allowed to try, whether, this being a claim founded on a right of inheritance, it should not have been included in a former suit instituted by the plaintiffs in 1832 and whether the allegation of the plaintiffs, that they were then in possession of the property now claimed, is a sufficient reason for not having included it in their previous suit.

The Court find from the record of the case that the plaintiffs sued in 1832 for one-third of half (or in the proportion in which they sue now) of the talooqah in which the abovenamed villages are situated, alleging distinctly that they sued for the full extent of their ancestral share, and that they were in possession, but desired to have through the Court *dukul kamil* and partition. That suit resulted in a decree in their favor. The present claim is therefore inconsistent with the claim urged previously ; and with respect to a plea advanced by the plaintiffs that they were at the time of the first suit, in possession of the rights they now seek to recover, so as to render unnecessary the inclusion of them in the previous plaint, the Court observe, that the same reason, which induced the plaintiffs to sue for other property of which they declared themselves to be in possession, would have equally induced them to sue for this property, even though they were in possession of it. The necessity or expediency must have been exactly the same in both cases according to the terms of their former plaint; the property now sued for falls within its scope; if so, the same suit is brought a second time, which is illegal; if not so, the institution of the present suit amounts to a splitting of the cause of action, which is opposed to the practice of our Courts, and is in contravention of the rule laid down in the Circular Order of 11th January 1839.

The Court, for the above reasons, annul the decisions of both the lower Courts, and dismiss the claim of the plaintiffs.



The 29th July, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 160 OF 1851. { *Special appeal from the decision of J. S. Clarke, Esq., Judge of Azimgurh, dated 7th September 1850.*

SREE GOPAL AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

DABEEDIAL SINGH AND OTHERS, (*Defendants*), *Respondents.*

THE plaintiffs are the zemindars of Madhoram *puttee*, and the defendants are proprietors of Buhadoorpore. On the occasion of the demarcation in 1834, preparatorily to the general Settlement, it became necessary to mark out the boundary between the two estates which had been in dispute for many years previously, and the Deputy Collector, who was charged with the duty, appointed a *punchayet* for that purpose, under the provisions of Sections 6 and 7, Regulation IX. of 1833, who, after a local enquiry which lasted more than two months, gave in an award. In the award, the rights and holdings of both parties are set down in detail, and 119 beegahs 16 biswahs of land designated as a quarter share of Shahpore, which were recorded as being at that time in possession of talooqah Buhadoorpore, were formally awarded to Madhoram *puttee*. No objection having been advanced by either party to the award, the Deputy Collector recorded an order accepting it as a valid one. At the time of the assessment, about a year afterwards, the Collector found some difficulty in ascertaining where the land awarded to Madhoram *puttee* was situated, and passed an order that the Settlement should be made on the basis of actual possession.

The plaintiffs eventually instituted a suit for possession of the 119 beegahs 16 biswahs under the award, and obtained a decree from the Principal Sudder Ameen, which was reversed by the Judge in appeal under the statute of limitation. On special appeal, the reversal was overruled, and the case remanded. On its retrial, the Judge was of opinion, that the suit was opposed to the ruling of the Court in the Construction 895, and the plaintiffs were nonsuited.

A special appeal was admitted to try, whether the Judge's order of nonsuit under the Construction was correct.

The point ruled in this Construction was that the decisions of *punchayets*, appointed under Regulation IX. of 1833, should be enforced by the Revenue Authorities, judicial functionaries

having no power to carry them into effect. It arose from a reference to the Court, in regard to the authority possessed by the Civil Courts to give a summary enforcement to such awards on the application of the parties in the manner prescribed for the execution of private arbitration awards in Clause 2, Section 3, Regulation VI. of 1813, and is inapplicable to this case. The appellants have incautiously used in their plaint, the words *ijraee fysala* as indicative of the object of their suit, but the ground of their action is clearly explained. They have come into Court, as any other claimant might do, to obtain possession of a right under an alleged title deed, and there is nothing to prevent the case being heard. The fact of the land awarded to them being traceable, together with the validity of the award, and any other questions that may present themselves, on the points, which the suit has been brought to determine, and which should be tried. The Court therefore annul the decision, and remand the case for retrial in advertence to the foregoing remarks.

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The 29th July, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE NO. 51 OF 1851. { Regular appeal from the decision of
 A. Lang, Esq., Judge of Allahabad,
 dated 26th December 1850.

MR. BERRILL AND OTHERS, (*Plaintiffs*), *Appellants*,
 versus

SHEO SUHAE, (*Defendant*), *Respondent*.

THE suit was brought by the plaintiffs as managers of the Inland Transit Company to recover Rs. 1,580, damages with interest for breach of contract. The particulars of the case are given in the Judge's decision in the printed volume. It appears that whilst the suit was in progress, the parties agreed to submit their case to arbitration. Arbitration bonds were executed, specifying a certain period for the completion of the award, on the expiration of which the arbitrator's powers were to cease, and an injunction to that effect was addressed by the Court to the arbitrator, who was desired to send in his award on the date fixed. An extension of the time was afterwards allowed by the Court, the latest date being fixed for the 27th September 1850. The award was completed on that date, but did not reach the Court until the following day, when the Judge set it aside on the

ground that it had not been delivered within the time fixed, and consequently was of no force, and, proceeding to a decision on the merits, dismissed the suit.

The appeal from the decision has been met by the respondent, who urges that the award was complete and valid, and could not legally be set aside. The appellant pleads for a decision on the merits, and contends that the award has been vitiated by not having been delivered into Court in time. This is the first point for decision in the case, for if the award be regular, it is valid in law, and must be upheld. Parties after referring their cause to arbitration, cannot be permitted to withdraw from it, when the issue is unfavorable to them, and the Courts are equally bound by the result. The Court are of opinion that the sense in which the Judge has understood the term "delivery" is not supported by the terms of the law of arbitration in the Regulation XXI. of 1803, and that the appellants' argument is not a tenable one. The law does not impose any restriction as to the place where the arbitration is to be held, and the provisions against any neglect or interested delay on the part of the arbitrator in the fixation of the time have obviously reference to the completion of the award by him, and not to its delivery into Court, which may be dependent on circumstances beyond the arbitrator's control. The common error on this point has perhaps arisen from the faulty rendering of the term "delivery" in the authorized translation of the Regulation, its real legal meaning being shown from the Section 7, where "delivery" and "completion" are used in the same sense. The Court accordingly hold that there has been no vitiation of the award, and that its non-receipt by the Judge on the prescribed date does not affect its validity. The arbitrator has awarded Rs. 117-3, out of the claim as principal with costs in proportion, which is decreed with interest from the date of decree to realization, in reversal of the decision of the lower Court.



The 29th July, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 52 OF 1851. { *Regular appeal from the decision of*
 A. Lang, Esq., Judge of Allahabad,
 dated 26th December 1850.

SHEO SUHAI, (*Plaintiff*), *Appellant*,
 versus

MR. BERRILL AND OTHERS, (*Defendants*), *Respondents*.

THIS was a counter suit brought by the defendant in the preceding case No. 51 against the plaintiffs in that suit for the recovery of Rs. 1,533-9-7; losses sustained by a breach of contract on the part of the defendants.

The parties submitted their case to arbitration, and an award was given for Rs. 737, with costs in proportion, which was set aside by the Judge for the reasons already stated in the preceding case, and in a decision on the merits the suit was dismissed.

The pleadings in appeal on both sides are the same, and the decision for the enforcement of the award, and for the reversal of the decision of the lower Court must be the same also. A decree is given accordingly on the basis of the award, which will bear interest from the present date.



The 6th August, 1851.

Present: H. W. DEANE, Judge.

CASE No. 73 OF 1851. { *Regular appeal from the decision of Mohu-
med Hoossein Khan, Principal Sudder
Ameen of Bareilly, dated 10th Decem-
ber 1850.*

MUSSUMAT MASOOMA BEGUM AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

DUTT RAM, (*Defendant*), *Respondent*.

THIS suit has been brought to recover possession of certain land and *baghs*, and of certain shops, forming one-half of a *gunje*, also to collect, as proprietors, the established taxes of a *hât*, or fair. The above right and interest are stated to have been mortgaged to the defendant under two separate deeds, one for Rs. 1,200, dated 25th May 1827, the other for Rs. 800, dated June 1827; and the plaintiffs bring their action to oust the mortgagee on the ground that not only has the mortgage been redeemed, but a large surplus, amounting to Rs. 5,058, is due to the mortgagors.

It is admitted by the defendant that the mortgage transaction took place as above; and it is not denied that the defendant has had the *usufruct* of the mortgaged property; but it is contended that so far from the mortgage having been redeemed, the proceeds of the property have not even covered the interest of the money advanced, and that the mortgagee is entitled to demand from the plaintiffs Rs. 6,494-10.

The Principal Sudder Ameen held that the statement of neither party, in respect to the accounts, is correct. He observed that, on the showing of the plaintiffs, the whole sum realized by the mortgagee during his possession is Rs. 9,058: that being so, the mortgage was, in the Principal Sudder Ameen's opinion, still unredeemed, because, from the sum for which the plaintiffs claimed credit in account not less than Rs. 6,800 must be deducted, (relating chiefly to the collections of the fair), as being items the exaction of which by the mortgage is not sanctioned by law, and which, consequently, cannot be taken into account in effecting an adjustment. The Principal Sudder Ameen dismissed the suit.

The decision of the lower Court is defective in an important particular. The Principal Sudder Ameen was not at liberty, in a case such as the present, to dispense with the course enjoined by Section 10, Regulation XXXIV. of 1803. He should have required the mortgagee to deliver in his accounts as prescribed

by that Section, and to swear to the truth of them, at the same time allowing the mortgager to offer any objections he might desire to make. This has not been done; and the suit must be sent back for retrial, in accordance with the precedent of this Court (Nowul Singh, plaintiff, appellant, *versus* Dhurum Singh and another, defendants, respondents), dated 2nd May 1846.

The suit is remanded accordingly, and the lower Court will understand that the whole case is open to reconsideration.

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The 13th August, 1851.

Present : { A. W. BEGBIE, } Judges.
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE NO. 127 OF 1851. { Special appeal from the decision of
 J. S. Clarke, Esq., Judge of Azimgarh,
 dated 7th September, 1850.

MUNOHUR RAE AND OTHERS, (*Defendants*), *Appellants*,
versus

SHAH MUKBOOL ALUM AND OTHERS, (*Plaintiffs*), *Respondents*.

THE particulars of this case will be found in the printed volume of decisions in the usual place.

A special appeal was allowed to try, whether the Judge has not erroneously held that the decree of Court in 1833, which was favorable to the plaintiffs, is sufficient to sustain the *whole* of the present claim, and whether, the Settlement of the disputed land having been made with the defendants in 1836, their possession must not be assumed since that period.

The Court hold that the aim and intent of the action brought by the plaintiffs in 1833, and the force of the decree then passed, have not been rightly apprehended by the Judge. The suit then brought was for *rent* of ten beegahs of land; and the Court, which tried the suit, finding the plaintiffs to be in possession, gave them a decree for *rent*, taking as a guide to its decision the boundary line drawn by the Ameen, who had been deputed for the purpose of local investigation. But that decree did not adjudge to the plaintiffs *proprietary* possession of even ten beegahs; and it is, therefore, worthless when cited in support of the present claim to proprietary possession of 74 beegahs 10 biswahs.

With regard to the second point urged in the certificate of special appeal, the Court are of opinion that the suit falls under statutory bar: under the measurement effected by the revenue authorities in 1836, and which, in the province to which this

district belongs, is in the nature of a Settlement, the land in dispute was assigned to the defendants. The *ruqhabundee* paper, the execution of which the measurement necessarily preceded, is dated March 1836, and the present suit, brought on the 11th September 1848, is not brought within the period during which it may be legally heard. It is nothing for the plaintiffs to urge that they have been in possession within twelve years from the date of suit; for they cannot have been in such proprietary possession as the law recognizes, in opposition to the order of the revenue authorities, which made over the land to another party. On this point the precedent of this Court (Rawut Ghunsam Singh, plaintiff, appellant, *versus* Durriao Singh and another, defendants, respondents) dated 8th January 1849, is decisive. The Court remarked in their judgment in that case: "it follows then that, under this provision of the law (Section 18, Regulation VII. of 1822) it was for the defendants to have sued to set aside the Collector's order, and so to establish their right to the land, if they claimed it, and not for the plaintiff, who had already obtained the land by order of the Settlement Officer." In the present case, it was for the plaintiffs, if they were dissatisfied with the Collector's order, to sue to set it aside, within the period of twelve years from the date on which it was passed; and this they have not done.

The Court, for the above reasons, reverse the decisions of both the lower Courts, and dismiss the claim of the plaintiffs.

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The 13th August, 1851.

Present : { A. W. BEGBIE, } *Judges.*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

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CASE No. 129 of 1851. { *Special appeal from the decision of*
 C. Allen, Esq., Judge of Furruckabad,
 dated 21st September 1850.

TILUK SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
 versus

DOORJUN AND OTHERS, (*Defendants*), *Respondents.*

THE printed volume of decisions of the Zillah Courts for September 1850 gives the particulars of this case.

A special appeal was allowed to try, "whether the Judge is not in error in declaring that it lies with the plaintiffs to prove that the damages awarded by the revenue authorities are excessive, and whether, rather, it does not lie with the defendants to prove that the damages for which the revenue authorities

have given an award have been sustained:" and on the case coming before a full Court, the certificate was amended by the addition of the following sentence, "whether the Judge has not erroneously assumed that the lower Court found the fact of damage."

With respect to the first point of the certificate, the Court observe that a plaintiff, who takes his stand on the broad ground that he has done no wrongful act, and comes into Court to try the issue whether a tribunal, whose sentence he contests, was or was not warranted in imposing a penalty upon him for an act done, necessarily throws on his opponent the burden of proof that wrong has been sustained; and if a Court calls upon a plaintiff so pleading to show that the amount of compensation decreed to his adversary is greater than it ought to have been, it not only itself assumes that *some* compensation is due, but calls on the plaintiff to acquiesce in the Court's assumption, in the very face of his essential plea. By no subtlety of reasoning can it be made to appear that the plaintiff would not be placed in this dilemma; and if it be said that all that the Court meant was to call on the plaintiff to show that his opponent had not suffered injury, then the Court impose the burden of proof on the party not liable to bear it, as has been above remarked. This is in fact to call on the party to prove a negative. In regard to the second point, the Court are of opinion that the Judge is in error. The Moonsiff distinctly found that no damage had been done, and he reversed that part of the decision of the revenue authorities which gave damages on the score of injury sustained: reversing the award of damages, the Moonsiff went on to order that the defendants pay to the plaintiffs the rent admitted by the defendants to be duly leviable from them, and which had been withheld by the defendants as a set-off against the amount of damages to which they were entitled under the revenue award.

The true point for trial has been overlooked by the Judge, or at least too readily assumed: and that point is, whether the plaintiffs are chargeable with illegal distraint or not: if they are not, it is clear that they cannot be mulcted in damage; if they are, it is for the Judge to decide to what extent there has been illegal distraint, and, consequently, what is the amount of damages which the case calls for.

The suit is remanded to the Judge's file, with reference to the above remarks.



The 18th August, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 130 OF 1851. { *Special appeal from the decision of*
 C. Allen, Esq., Judge of Furruckabad,
 dated 21st September 1850.

TILUK SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
 versus

RUMMA AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are given in case No. 129, decided this day. For the reasons therein set down, this suit is remanded to the Judge's file.

The 13th August, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 131 OF 1851. { *Special Appeal from the decision of*
 C. Allen, Esq., Judge of Furruckabad,
 dated 21st September 1850.

TILUK SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
 versus

DUMMER AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are given in case No. 129, decided this day. For the reasons therein assigned, this suit is remanded to the Judge's file.

The 13th August, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, Offg. Judge.

CASE No. 132 OF 1851. { *Special appeal from the decision of*
 C. Allen, Esq., Judge of Furruckabad,
 dated 21st September 1850.

TILUK SINGH AND OTHERS, (*Plaintiffs*), *Appellants*.
 versus

CHOTA AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are given in case No. 129, decided this day. For the reasons assigned therein, this suit is remanded to the Judge's file.

The 13th August, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE NO. 169 OF 1851. { *Special appeal from the decision of Moulvee Ruzee-ood-deen Khan, Principal Sudder Ameen of Allygurh, dated 28th January 1851.*

MOHUMED HYBUT-COLLAH, (*Plaintiff*), *Appellant*,

versus

DURAB KHAN, (*Defendant*), *Respondent*.

THE suit was brought to recover a balance of rent for the *khur-reef* season of 1257 *Fuslee*, due, under a two years' lease, for the years 1257 and 1258 *Fuslee*, said to have been executed by the defendant for 11 beegahs 8 biswahs of land at Rs. 15 per annum. The defendant denied the execution of the lease, and pleaded that he had always paid a yearly rent of Rs. 10.

The Moonsiff, being of opinion that the lease was proved, decreed the suit. The Principal Sudder Ameen reversed the decision, on the ground of the evidence to the execution of the lease not being reconcileable with the fact of less having been paid as rent in the two years immediately preceding; and from this fact it is inferred that the plaintiff was attempting exaction under pretence of a new engagement. A remark is added that as the suit had been brought on paper of a quarter value under Regulation VIII. of 1831, the same rules would guide the decision as in the summary suits in the revenue Courts, and the rejection of the putwarree's evidence for the reason above stated would therefore of itself be fatal to the suit. The decision is not clearly worded, but such appears to be its purport.

A special appeal was admitted to try whether the decision was not imperfect from the Principal Sudder Ameen having failed to adjudicate the pleas of the parties.

The only point at issue between the parties, which the Court had to determine, was the execution of the lease and its counterpart agreement; and the rules of proof and principles of decision would be the same for these documents as for any other document that parties might contest in a Civil suit. The Principal Sudder Ameen in his decision cannot be said to have tried the merits of the case at all; and he has erred in deducing from the single fact of less rent having been paid in former years, a reason for the rejection of the evidence to the new engagement pleaded. The Principal Sudder Ameen is further wrong in his view of the intent of Section 8, Regulation VIII. of 1831. Constructions No.

930 and 1001 have explained that suits instituted under that Section are to be considered in all respects as regular Civil suits, and this must be decided accordingly. The decision is annulled, and the case remanded, in order to its retrial. The stamp will be refunded, and the costs charged as usual.

The 18th August, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 36 OF 1850. { *Regular appeal from the decision of Abdool*
 Azeez Khan, Principal Sudder Ameen of
 Goruckpore, dated 14th December 1849.

SAHIB ZADEH MUHESPERTAB SINGH, LALL SATURDOWAN SINGH,
 RUN BAHADOOR SINGH, (OF FULL AGE), AND RANEE SURUBJEET
 KUOR, GUARDIAN AND MOTHER OF JUGGUT NARAIN SINGH,
 OF BABOO DEIGOPAL SINGH AND OF INDERPERTAB SINGH,
 MINORS, (*Plaintiffs*), *Appellants*,

versus

RAMGHUREEB CHOWBE AND RAJAH RUDDOO PERTAB SINGH,
 (*Defendants*), *Respondents*.

CLAIM, to erase from the Settlement record the name of Ramghureeb Chowbé, to insert instead thereof the names of the plaintiffs, and to obtain possession of Bowree Per Kulan and four other mouzahs, by annulling a deed of conditional sale, dated Cheyt 1244 Fuslee, in virtue of which Ramghureeb Chowbé got a decree on 15th April 1841; also to recover Rs. 6,824-7-2, principal and interest of *mesne* profits. Full value of the claim Rs. 9,741-4-8.

The plaintiffs are the sons and wife of the defendant Rajah Ruddoo Pertab Singh. The latter executed a deed of conditional sale of a portion of his landed property in 1244 Fuslee (or 1837 A. D.) in favor of the other defendant Ramghureeb Chowbé. After foreclosure, Ramghureeb Chowbé became, under decree, proprietor of the mouzahs. The whole case turns on the applicability or not to this transaction of that portion of the Hindoo Law which prohibits the alienation of undivided real property, without consent of heirs, unless under particular circumstances.

The plaint sets forth that the disputed mouzahs are the hereditary undivided property of the family, and that Ramghureeb

Chowbé got possession of them under a deed of 1244 Fuslee; that he took out process and got possession, as above, during the minority of all the sons. It is pleaded that although the deed in favor of Ramghureeb Chowbé describes the loan as having been contracted by the father of the plaintiffs to meet *malgoozaree* demands, the payment of *malgoozaree* is not a necessary expence in the eye of the Hindoo Law, and that no balances existed so as to warrant Rajah Ruddoo Pertab Singh in contracting debts on that account. It is asserted that the money was really borrowed by the Rajah for unworthy and frivolous purposes, to enable him to satisfy the importunity of *nditch* women, and indulge in the sports of the field. The Rajah has devoted (so his sons plead), large sums of money to similar extravagancies.

Rajah Ruddoo Pertab Singh does not put in any answer to the suit.

It is replied by Ramghureeb Chowbé that the transaction was conducted in perfect good faith, and that the Rajah really required the money for the purposes specified in the deed; that ever since he (Ramghureeb Chowbé), obtained possession by decree against the Rajah, the latter has sought every occasion to annoy him with complaints preferred to the Collector, and has now, as a last resource, instigated his sons to come forward with this claim. The defendant further pleads that *malgoozaree* cannot be considered as other than a necessary expence, since the Government are little accustomed to dispense with the payment of their revenue, and by the above alienation the Rajah preserved the main bulk of his real estate by the sacrifice of a small portion of it.

The Principal Sudder Ameen was of opinion that the claim of the three plaintiffs' eldest sons of the Rajah is barred, inasmuch as it is laid down by a precedent of this Court, dated 3rd August 1848, that a minor must sue within a reasonable time after attaining his majority, which rule the above three plaintiffs had failed to observe. With respect to the merits of the claim, as admitting of adjudication between the other plaintiffs and the defendants, the Principal Sudder Ameen was clearly of opinion that the money was borrowed for what, in the terms of the Hindoo Law, is called *mooseebut*, for necessary expences, the oral evidence to prove the reverse being wholly unworthy of credit; and there is good reason, in the Principal Sudder Ameen's opinion, for thinking that the real instigator of the suit is the Rajah himself. The precedent of this Court, of 19th December 1846, does not, in the judgment of the Principal Sudder Ameen, apply in this case, since, in the present instance, the necessity for the alienation is shown, and in the above precedent it was not shown. The lower Court dismissed the claim.

There is one part of the Principal Sudder Ameen's decision, which, the Court observe, is clearly faulty: the suit is not barred by lapse of time as respects any of the plaintiffs; for it is admitted by both sides that not quite twelve years have elapsed between the cause of action and the date of suit; that being so, it is nothing to say that under the precedent of 3rd August 1848, a minor must sue within a reasonable time after completing his full age, the assumption in that precedent being that the period ordinarily allowed by law had passed, and that the minor was disqualified by his minority from appearing in Court within it. Under certain circumstances, the period of twelve years allowed by law for bringing suit may be extended, but it can never be curtailed.

In regard to his dismissal of the claim, the Court concur with the Principal Sudder Ameen: they see no reason whatever to doubt that the money was borrowed by the Rajah for necessary expences, as specified in the deed executed to Ramghureeb Chowbé. At that time the precedent of 19th December 1846 did not exist: the Courts were not to question alienations of this nature; and there is consequently good warrant for believing that the deed of conditional sale truly describes the purpose for which the money was required. No object was to be gained by misrepresentation. There is also, the Court think, some reason for joining in the Principal Sudder Ameen's belief that the real mover in the suit is the Rajah, and that the so-called plaintiffs are merely instruments in his hands; and this presumption is strengthened by the circumstance that the stamp on which the petition of plaint is engrossed first bore the name of buyer "Jankee Pershad *mookhtear* of *Rajah Pertab Singh*," which has been altered to Jankee Pershad, *mookhtear* of *Inderpertab Singh*," as if it had been by a blunder that no disguise was thrown over the purchase of the stamp of plaint by the *mookhtear* of one of the defendants, and as if convenience suggested the reparation of the blunder by the change of "*Rajah Pertab Singh*" into the only name among those of the different plaintiffs into which it could well be changed, that of "*Inderpertab Singh*." The Court take occasion to record their opinion that in all cases such as the present, the necessity of alienation must be presumed, unless on very clear proof to the contrary; unless on very clear proof that the alienor is a spendthrift, who, regardless of the interests of those who are to come after him, wilfully makes wreck of his ancestral estate.

The Court dismiss the appeal. They do not consider it necessary to remand the suit, to be tried on its merits, in regard to the three plaintiffs, Sahib Zadeh Muheshpertab Singh, Lall

Suturdowan Singh and Run Bahadoor Singh; because the reasons assigned for rejection of the claim by the Principal Sudder Ameen apply with exactly equal force to every one of the plaintiffs; and the Principal Sudder Ameen could not, if the suit were sent back to him, by any possibility, pass a judgment on the claim of the elder sons different from that which he has already passed on that of the younger. The remand would be a mere empty form.

A separate proceeding will be addressed to the Magistrate instructing him to enquire into the apparent forgery or fraudulent alteration on the back of the petition of plaint, with a view to the prosecution of the parties concerned, should there appear sufficient ground for the adoption of that measure.

The 18th August, 1851.

Present : { A. W. BEGHIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 161 OF 1851. { *Special appeal from the decision of*
G. Blunt, Esq., Judge of Allypore,
dated 5th September 1850.

THAKOOR BHURT SINGH, (*Defendant*), *Appellant,*

versus

KESHOO AND OTHERS, (*Plaintiffs*), *Respondents.*

THE particulars of this case are given at length in the Judge's decisions of 21st February and 5th September 1850, and may be found in the printed volume in the accustomed place.

A special appeal was admitted to try whether it was competent to the Judge to define the extent of the interest mortgaged, under the circumstances of this mortgage.

The Court are of opinion that the course adopted by the Judge is not borne out by judicial usage. It has been repeatedly laid down that any one mortgager of a common mortgage may redeem the whole property mortgaged on payment of the entire sum due.

The effect of the Judge's decision is to disallow this right. Any claim set up by the appellant, in virtue of his purchase of the rights of certain of the mortgagers, must form the subject of adjudication in a distinct suit, when the Court trying the suit will determine the extent of those rights, and such a claim cannot be tried incidentally in a suit for redemption. The effect of seeking to relieve a case from perplexity by any deviation from established rule is only to involve it in still greater perplexity.

Under ordinary circumstances, a decree cannot be altered so as unfavorably to affect an appellant; but the vakeel of the respondents having objected to that part of the Judge's decision, which has disallowed a portion of their claim, it is competent to the Court, under Construction 868, to go into the case as affecting both parties.

The Court annul the decision of the Zillah Judge, and uphold that of the Principal Sudder Ameen.

The 18th August, 1851.

Present: { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 167 OF 1851. { *Special appeal from the decision of G. Blunt, Esq., Judge of Allygurh, dated 21st February 1851.*

**TEJ SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus**

MUNGUL SINGH AND MEHTAB SINGH, (Plaintiffs), Respondents.

THE decision appealed from is in the printed decisions of the month.

A special appeal was admitted to try whether the lower Court's decisions were not faulty in their having decreed an interest in the property in excess of the interest covered by the deed of sale held by the respondents.

A specific portion of the property, represented by 8 biswansees 6½ kuchwansees, was put up to sale in satisfaction of a decree against Phop Singh, and purchased by the respondent. The *qabala* or sale deed conveyed to them the rights of Phop Singh in this portion, and no more. The respondents have now made this sale deed a ground of action in a suit for possession and division of *one-third* of the property which they represent as belonging to Phop Singh, to whose rights in the entire property they claim to have succeeded. The lower Courts, without advertence to the extent of the interest actually transferred, proceeded to enquire into and determine the hereditary share held by Phop Singh, and, finding it to be one-third, decreed accordingly.

The Court observe that a limited portion only having been sold, the purchasers cannot claim more than their title deed conveys to them. A case nearly parallel will be found in the volume of the decisions of the Calcutta Court for 1850, page 97. The Court modify the decision, and restrict the decree to the interest purchased, viz: 8 biswansees 6½ kuchwansees. Costs will be charged in proportion.

Present: { A. W. REGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 136 OF 1851. { *Special appeal from the decision of
Doobé Jowala Pershad, Principal
Sudder Ameen of Azimgurh, dated
18th January 1851.*

LUCHOO SINGH, (Plaintiff), Respondent.

The record of the case shows that the plaintiff sued five persons for the above right in 1826, and that his suit was dismissed in 1834. The judgment was however overruled on special appeal; and, in 1838, the plaintiff obtained a decree in his favor. In the meantime, at the Settlement, which took place in 1836, some thirty-six other persons were admitted as sharers in the contested property and obtained possession. The plaintiff put in execution his decree obtained in 1838, and the above sharers objected. The Judge disallowed their objection, holding that the decree was virtually passed against all parties in possession. The Sudder Court, on appeal, cancelled that part of the Judge's order which declared the decree to have been virtually passed against all who were in possession, and directed that the decree be executed in the usual course, any dissatisfied party being left to seek redress wherever he thought proper. The plaintiff subsequently brought a suit for division, and was nonsuited in 1845. The present claim for possession and division is brought on 3rd November 1849.

A special appeal was allowed to try whether the plaintiff's suit is not barred by the statute of limitations.

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them, in opposition to the Settlement arrangement, that valid proprietary possession which a Court of law recognizes. The suit brought by the plaintiff for division, in which he was nonsuited in 1845, cannot, as is pleaded, be taken into account, as relieving the plaintiff from the legal consequences of his default; for a suit for division merely, not for possession, of property assigned at the Settlement to other persons, is not in reality a suit to set the Settlement aside, but is rather to be looked upon as a process by which the necessity of so suing is sought to be evaded. Had the plaintiff formerly sued for possession and been nonsuited by reason of some informality, it might have been pleaded that the suit is not barred; since, in calculating the period of limitation, the practice of the Courts allows a deduction of the time during which a nonsuited case was pending, whenever the same suit is revived. But the present suit is not the same with that which resulted in a nonsuit: it is the first suit which the plaintiff has brought for possession; it is a suit now for the first time brought for the true purpose of contesting the Settlement; and as the cause of action is thrown back so far as 1836, (the year in which the Settlement was made with the putteedars) the suit brought in 1849 cannot be heard.

For these reasons, the Court annul the judgments of the lower Courts, and dismiss the plaintiff's claim.

As it appears from the record that the plaintiff was admitted at the Settlement to a two-anna share, which has been unnecessarily included in the present claim, the Court deem it proper to add that nothing contained in this decree is to be understood to affect the plaintiff's title to whatever fractional share in the talooqua the Settlement may have assigned him.

The 21st August, 1851.

Present : S. S. BROWN, Offg. Judge.

CASE NO. 184 OF 1851. { *Special appeal from the decision of R. J. Tayler, Esq., Judge of Jounpore, dated 10th December 1850.*

SHEO PERSHAD SINGH AND OTHERS, (Defendants), Appellants,
versus

SHAH HOOSSEIN BUKSH AND OTHERS, (Plaintiffs), Respondents.

THE parties in this case are the proprietors of adjacent mouzahs, and the suit was brought for the recovery of the value of a tree which had been cut down by the defendants. Both parties alleged that the tree belonged to them, and stood within their boundary, as laid down on the occasion of the last demarcation

in 1839. The parties being content to rest the issue of their ownership of the tree on this point, it remained for the Court to determine whether the tree stood within the plaintiff's boundary as fixed in 1839, and to decide the suit accordingly; but the Moonsiff has gone beyond this in his decision; and after recording an ambiguous opinion in regard to the locality of the tree according to the boundary of 1839, has entered into an investigation of the boundary between the two properties *de novo*, and followed a boundary line laid down in a decree of the year 1801, which is declared to be more trustworthy than the latter demarcation. The special appeal was admitted to try whether the Courts had not erred in not adjudicating the pleas of the parties.

The appellants' objection that the Courts have in reality decided an important boundary question in a suit for the value of a tree is borne out by the facts. The decisions of both Courts are annulled, and the case is remanded to the Court of the Moonsiff, who will replace it on his file, and proceed to a retrial. The stamp will be refunded, and the costs charged as usual.

The 25th August, 1851.

Present : { A. W. BEGBIE, } *Judges.*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 48 of 1851. { *Regular appeal from the decision of Tus-suddooq Hoossein Khan, Principal Sud-der Ameen of Cawnpore, dated 31st December 1850.*

SED MULL, (Plaintiff), Appellant,

versus

MUSSUMAT RAJ RANEE, WIDOW OF RAJAH NIRUNDERGIR,

(Defendant), Respondent.

THE plaintiff brings his action to recover Rs. 14,283-14, principal and interest, due under a bond. After a detail of the money transactions between the defendant and himself, he proceeds to state that the defendant provided for the gradual liquidation of the debt by the assignment to him of the half-yearly payments of the proceeds of a resumed *jageer*, which were disbursed to her from the Cawnpore Treasury, under the orders of the Government, and that the arrangement was notified by her to the Collector. One payment was made to the plaintiff accordingly; but the defendant afterwards broke faith with him; and the Treasury authorities withheld further disbursements to him in consequence. The plaintiff has now had recourse to the

Civil Court to establish his claim under the bond, and to obtain the issue of a precept to the Collector for the disbursement to him of the half-yearly allowances receivable by the defendant from the Treasury in conformity with the terms of their agreement.

The defendant denied the receipt of value in full under the bond. She further pleaded that the bond included illegal interest, and urged that the allowances were of the nature of a pension, and could not be attached.

The Principal Sudder Ameen, for the reasons set forth in his decision, admitted the last plea, and nonsuited the plaintiff.

The correctness of the order of nonsuit is the only point for consideration in appeal, the merits not having been entered upon in the lower Court; and this will be determined by the evidence to the nature of the allowance. The Court in reply to a reference from the Judge of Furruckabad, laid down the principle to be followed in such cases in a letter published in the Appendix to the Report on the Civil Administration of 1847; and they now adopt the same, judicially, as consistent with the law. The extract is as follows:—"The Commissioner has prohibited the attachment of the allowance, on the ground that it is 'pensionary' and 'substituted for a personal grant of rent-free lands for personal subsistence.' The Commissioner's declaration that the allowance is pensionary, assumes the whole question at issue, for pensions have been expressly exempted from seizure by Regulation XII. of 1814, and Construction No. 788, which merely illustrates, and insists upon the practical enforcement of the prohibition which that Regulation enacts. But a reference to the terms and the avowed purposes of that Regulation is sufficient to show that the allowance, which is now the subject of consideration, is not in the same category with the pensions thereby exempted from attachment in execution of the decrees of Court. This allowance was not granted to 'any worn out public servant for his support and maintenance in old age;' it was not the result of the spontaneous beneficence and charity of the Government, nor are the views of the Government likely to be defeated by the attachment which is now solicited. This allowance is just as much the property of the owner, as were the rent-free lands for which it was substituted; and it is, therefore, liable to seizure in execution of a decree as the ceded lands would have been had they now been in possession of the judgment debtor; it is in fact an annuity, for which the recipient has paid its full value, and not a privileged income gratuitously given in consideration of past services." The distinction here drawn between commutatory and eleemosynary allowances, when applied

to the present case, will show the allowance to be of the latter class. It appears from the copies of the letter of the Secretary to the Government, North Western Provinces, dated the 12th May 1841, and of the resolution accompanying it, which have been filed by the respondent, that the *jageer* of pergunnah Secundra, granted to the late Rajah Nirundurgir, lapsed to Government by the failure of legitimate issue, but that the proceeds of the *jageer* were appropriated to the family of the late Rajah, after the deduction of 20 per cent. for costs of collection, to be divided into pecuniary stipends, and paid periodically from the Treasury at Cawnpore as other pensions. All claim of right on the part of the Rajah's family having thus become extinguished, any allowances bestowed on them were strictly "the result of the spontaneous beneficence and charity of the Government," whether granted in the form of net proceeds, or as a fixed sum; and ranking as pensions they are not liable to the attachment and control of the Courts.

The Court observe that the Principal Sudder Ameen, in disregard of the Circular Order of the 18th September 1843, passed over the plea for nonsuit in his interlocutory proceeding, under Section 10, Regulation XXVI. of 1814, and took proofs from both parties on the merits. Appellant has objected that the judgment of the lower Court has not disposed of the merits; but the main object of the suit being to get possession of the pension, which the Courts are incompetent to decree, the suit in its present form does not admit of a decision on the merits. The judgment of the lower Court is confirmed, with costs.

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The 25th August, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 89 OF 1851. { Special appeal from the decision of
J. S. Clarke, Esq., Judge of Azim-
gurrh, dated 19th December 1850.

REASUT ALI, (Plaintiff), Appellant,
versus

DEENDEYAL RAI AND PEEB ALI, (Defendants), Respondents.

THIS case will be found reported in pages 104 and 105 of the printed decisions for zillah Azimgurrh, for the past year.

A special appeal was admitted to try, "whether the Judge's recorded opinion, that there is no law existent under which a

lease of this nature can be declared invalid, and the terms of the contract mutually entered into by the parties must be considered binding and be upheld," be in conformity with law and judicial precedents or otherwise.

The Court are of opinion that the decision of the Judge is opposed to established precedents of this Court. There is nothing in the present case which distinguishes it from others in which this Court have determined the holding to be of the nature of a mortgage and not a lease. If by merely substituting the word *theeka* for *rihan* assignments of this description are to be considered *farms*, the usury laws will be evaded with the utmost facility. The Court do not perceive the relevancy of the Judge's allusion to Act XVI. of 1842, which does not bear at all upon the present case; and as the Principal Sudder Ameen makes no mention of that Act in his decision, the Court do not concur in the opinion expressed by the Judge that the Principal Sudder Ameen came "to the decision he has formed from a misapprehension of the scope and intent" of that Act.

The decision of the Judge is reversed, and the suit remanded to his Court, in order that it may be dealt with as a case of mortgage.

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The 25th August, 1851.

Present: { A. W. BEGBIE, } *Judge*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 103 OF 1851. { *Special appeal from the decision of*
 G. F. Harvey, Esq., Judge of Cawn-
 pore, dated 28th January 1851.

DOOLAREE LALL, (*Plaintiff*), *Appellant*,
versus

ZALIM SINGH, (*Defendant*), *Respondent.*

THIS case will be found reported at pages 27 and 28 of the printed decisions for zillah Cawnpore, for the current year.

A special appeal was admitted to try, "whether the Judge's reasons for dismissing the plaintiff's claim to interest are sufficient or otherwise."

The Court are of opinion that the reasons assigned by the Judge for not allowing interest to the plaintiff are insufficient: the *only* reasons assigned by the Judge are, that "he should have brought his claim earlier" and "the negligent manner in which he has cared for his own interest;" but it has been ruled, by the Court of Sudder Dewanny Adawlut at the Presidency, that "the

Courts are not competent to strike off interest on the ground of delay in suing for a debt, if the debt be otherwise cognizable ;*

* Sudder Dewanny Adawlut,
Select Reports, 7th August
1820, Vol. 3, page 48.

† Sudder Dewanny Adawlut,
Select Reports, 2nd June
1842, Vol. 7, page 3.

and this doctrine is again laid down in a more recent decision of the same† Court. The Court do not recognize the authority assumed by the Judge to impose a penalty on parties for not registering deeds, the registration of which is by law optional. The Court accordingly modify the Judge's decision, and decree the interest claimed by the plaintiff.

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The 25th August, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 168 OF 1851. { *Special appeal from the decision of S. Fraser, Esq., Judge of Bareilly, dated 14th February 1851.*

MUNSARAM AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

CHUNDUN LALL, (*Defendant*), *Respondent.*

THE particulars of this suit are in the printed volume for the month.

A special appeal was admitted to try whether the Judge was right in upholding the sale, notwithstanding that the decree, for the realization of which the property had been brought to sale, had been duly satisfied previously.

The Court are of opinion that the validity or otherwise of the sale, which was effected by the Collector of Bareilly in pursuance of a precept of the Furruckabad Court, must be held to depend upon the proof to the fact of the judgment debtor having done all that was necessary in order to stay the sale *within a reasonable time*. If this cannot be shown, there has not been any vitiation of the sale in law, and it must be maintained.

The Court, without adopting the reason drawn from the power of the plaintiff to stay the sale by appearing before the Collector, which is assumed amongst other reasons in the decision, concur with the Judge that the proper measures were not taken by the judgment debtor to satisfy the decree of the Furruckabad Court in time, and that he cannot justly claim a reversal of the sale, which would not have taken place but for

his negligence. The same principle has been laid down already in a judgment of the Calcutta Court in the Miscellaneous Department, dated the 27th December 1842, and the security of those who purchase at public sales, on the faith of the proclamation, whose title would otherwise be constantly open to disturbance from collusion and fraud, forms an additional reason for strictly upholding it as the legal rule. The appeal is accordingly dismissed with costs.

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The 25th August, 1851.

Present: { A. W. BEGBIE,
 H. W. DEANE, } *Judges,*
 S. S. BROWN, *Offg. Judge.*

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 CASE NO. 171 OF 1851. { *Special appeal from the decision of J.
 Lean, Esq., Judge of Mooradabad, dated
 10th February 1851.*

SHEORAJ SINGH, (*Defendant*), *Appellant*,
versus

MUNSOOKH RAI, (*Plaintiff*), *Respondent*.
 No. 170 OF 1851.

MUHA SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

MUNSOOKH RAI, (*Plaintiff*), *Respondent*.

THE particulars of this case are fully detailed in the Judge's decisions of the 12th November 1849, and 10th February 1851, in the printed volumes. The appeals are from the two parties of the defendants, and may be disposed of together.

The special appeal was admitted to try three points arising out of the case, of which it will be sufficient to consider the first one, of limitation.

The Judge has held no lapse had occurred between 1825, the year of foreclosure, and the year 1848, in which the suit was brought for possession. The reasons assigned are that, after the order for possession had been passed by the Court in the Miscellaneous Department in 1825, the plaintiff continued to file petitions for execution of the order up to the year 1833; that no orders were ever passed for striking the case off the file; and that the case must therefore be considered to have been pending during the interval from 1833 to 1848. The Judge, in arriving at this conclusion, has viewed the order of the Miscellaneous Department in the light of a decree, and has quoted the Circular Orders of the 22nd July 1813, and 17th January 1834, in

evidence of the practice of the Courts at the time in question. It will not be necessary in this place to determine whether practice can supersede the law as explained in the two Circular Orders quoted. The Court merely observe that the latter Circular is directed against the habit of giving judicial opinions, not only on the fact of the foreclosure, but also upon other points connected with it, which were only decidable in a regular suit, and that it is not evidence of the existence of a practice which had been prohibited by the first Circular. On the subject of the limitation, the Court entertain no doubt that the suit has lapsed. The Judge admits that the order was never put in execution, and the plaintiff himself does not maintain the contrary. He assigns the attack of a malady as the reason for his delay in bringing the suit, which was rejected by the Principal Sudder Ameen as insufficient. It would be of no consequence to the suit if plaintiff had continued to present petitions up to the date of its institution; for it has been repeatedly ruled that the presenting of a miscellaneous petition will not save limitation, and the plaintiff not having moved in any regular suit for possession within twelve years from the date of the order for foreclosure in 1825, the suit is now barred.

The Court accordingly reverse the decision of the Judge, and dismiss the suit, with costs.

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The 26th August, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

CASE No. 91 OF 1851. { *Special appeal from the decision of*
 G. F. Franco, Esq., Judge of Saharunpore, dated 6th January 1851.

KUNHYA LALL, (*Plaintiff*), *Appellant*,
 versus

KASIM ALI, (*Defendant*), *Respondent*.

THE printed decisions for January last give the particulars of this case.

A special appeal was allowed to try whether the Judge should have refused interest to the plaintiff on the amount to which the plaintiff was declared entitled; also, whether the Judge should have charged the plaintiff with the costs of suit in the Zillah Court.

The Court find that the charge by the plaintiff of interest is in conformity to the written agreement between the parties; that

it is expressly stipulated in the bond on which suit is brought; and in the absence of any reason assigned by the Judge for refusing it, the Court are of opinion that it should have been allowed. As respects the second point in the certificate, no cause is shown why the course enjoined both by law and usage of charging the losing party with the costs of suit should have been deviated from in this instance.

The Court, therefore, amend the decision of the Judge. They decree to the plaintiff the interest sued for on the principal sum awarded by the Judge, and they further charge the defendant, Kasim Ali, who is the only respondent in the case, with the costs of suit.

The 30th August, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 43 OF 1850. { *Regular appeal from the decision of Abdool
 Ruhman Khan, Principal Sudder Ameen
 of Benares, dated 14th December 1849.*

HURBURN SINGH, *mookhtear* OF RAJAH ISHREEPERSHAD NARAIN
 SINGH, (*Plaintiff*), *Appellant*,

versus

JUGGOO SINGH, BHUGNOO SINGH AND SHEOBURAN SINGH,
 (*Defendants*), *Respondents*.

THIS is a claim to recover Rs. 5,489-9, being principal and interest of a balance occurring in 1244 Fuslee, on a lease of the villages of Purteh and Singhora, recoverable under a security bond dated 1239 Fuslee, and proved by the *furd wasil bakee* of Koonj Beharee, *wasil bakee nuvees*.

The Principal Sudder Ameen passed judgment against Juggoo Singh and Bhugnoo Singh on their confession, and dismissed the claim in respect to the defendant Sheoburan Singh.

The present appeal is made against the order exempting Sheoburan Singh.

It is stated in the plaint that Bahadur Ali and Hoossein Ali, residents of Azimgurh, took from the plaintiff Ishreepershad Narain Singh, who is the Rajah of Benares, a lease of the above villages for ten years, from 1239 Fuslee to 1248 Fuslee, at an annual jumma of Rs. 3,705, on the security of Mohesh Singh and Dotal Singh. The lessees were put in possession, and retained it till 1240 Fuslee, when they left the mouzahs in the hands of the

securities. The latter held from 1240 Fuslee, till the month of Asar in 1244 Fuslee. The securities fell into balance for 1243 Fuslee and 1244 Fuslee, and the plaintiff ejected Dotal Singh and the defendant Sheoburan Singh, who is the heir of the other surety, Mohesh Singh. The plaintiff, on 19th June 1839, sued for the balance due to him, amounting, with interest, to Rs. 3,579, and the suit was dismissed by the Court of first instance on 26th December 1840. In appeal, this decision was set aside, and, on the 19th May 1842, the plaintiff was nonsuited. The plaintiff now renews the action, and it is brought against the property inherited from the security, Dotal Singh, by his sons Juggoo Singh and Bhugnoo Singh, and against the property, which has come to Sheoburan Singh from his father Mohesh Singh.

The defendant, Sheoburan Singh, answered, in the lower Court, that the plaintiff, though he founds his claim on the security bond of 1239 Fuslee, did not, in his former suit, sue on the *furd wasil bakee* of Koonj Beharee; that the present claim being directed against the defendants' ancestral property, the plaintiff should have distinctly set forth that the defendant is in possession of ancestral property; that the lessees may be still living, or if not, that they may have left heirs, and that the action properly lies against the lessees themselves, not against their sureties; that the present claim varies in certain points of detail from the former claim; that no date of the death of the lessees is given by the plaintiff; and, finally, that the plaintiff held the mouzah *kham tehseel*, and realized the balance from the *assamees*, consequently, that this *jumok*, or assignment, formally released the sureties from liability.

The Principal Sudder Ameen remarked that the case of the plaintiff is weak; that his suit was originally dismissed, and, in appeal, nonsuited, from which period the plaintiff maintained silence in respect to his demand for six years; and that having now brought over to his side Juggoo Singh and Bhugnoo Singh, he has been emboldened to institute this action. The *furd* put in, in the former suit, was drawn up by a *karinda* named Surnam Singh, and the suit was dismissed. Surnam Singh was not the putwarree, and Seetul Dhan, who held that office, did not sign the *furd*, and was not produced by the plaintiff, and a claim cannot be based on the *furd* of any person whom the plaintiff may choose to designate *wasil bakee nuvees*; there is therefore reason to distrust the *furd* put in by Koonj Beharee. The oral evidence proceeds from persons who reside in the plaintiff's neighbourhood, and have sided with him. The main question is, however, did a *jumok* take place, that is, were the *assamees* summoned, and was it arranged that they should pay their dues to the plaintiff, not to the sureties, so as to relieve the latter from all further res-

possibility? In the opinion of the Principal Sudder Ameen the *jumok* took place, the record of the former suit containing proof thereof, and sufficiently establishing the fact that the plaintiff's claim against the sureties was finally set at rest.

It is urged in appeal that if a *jumok* had really been made, as asserted by Sheoburan Singh, a *jumoknamah* or paper of similar import would undoubtedly have been drawn up at the time, and the security bond, now in the plaintiff's possession, would have been returned cancelled; that the decision of the former Principal Sudder Ameen, on which the present functionary is disposed so much to rely, cannot be taken into consideration in adjudicating the present claim; that the putwarree, Seebul Dhan, could not be found on the occasion of the former suit; that the defendant Sheoburan Singh does not deny that his father was surety, does not deny that the balance accrued, only insists, but altogether fails to prove, that the plaintiff's demand was arranged by *jumok*.

The main proofs adduced by the respective parties resolve themselves into the following.

On the part of the plaintiff, *furd wasil bakee* and *khuteonee* of 1243 and 1244 Fuslee; security bond and *kuboolecut*; depositions of witnesses.

The plaintiff's account is thus given:—

	R.	A.	P.
Balance of 1243 Fuslee, ...	1,840	4	6
Due on <i>theeka</i> of 1244 Fuslee, ...	3,705	0	0
	5,545	4	6
Deducted as remitted by Government for <i>khana</i> } <i>shumaree</i>	75	0	0
Total,	5,470	4	6
Realized of balance due for 1243 Fuslee, ...	1,840	4	6
Realized on jumma of 1244 Fuslee, ...	885	3	6
	2,725	4	6

Balance remaining due,
Rupees, 2,744 12 6
Add, 2,744 12 6 on account of interest,
Total 5,489 9 0 as in plaint.

On the part of the defendant, copy of *furd wasil bakee* put in, in former suit; copy of depositions taken in former suit; depositions of three witnesses summoned in present suit.

The Court are of opinion that whereas the plaintiff rests his claim on the undisputed fact of the balance having accrued and of the liability of the defendants as sureties, and positively denies the *jumok*, and further calls witnesses in support of his

demand, the answer of the defendant Sheoburan Singh, supported by oral evidence only, and that not altogether satisfactory, that a *jumok* was effected, is not such an answer to the claim as can be taken to absolve that defendant from a *prima facie* liability. The oral evidence is not satisfactory; because, with the exception of the testimony of three persons, it consists of the depositions taken on the part of the defence in the former suit, to which Sheoburan Singh himself did not answer. Had such an arrangement as that pleaded by Sheoburan Singh really taken place, it is scarcely possible that the sureties should have failed to protect themselves by procuring a record of it in some shape or other. But there is no trace of any such record.

The Court pass a decree for the principal sum claimed, against the property inherited by Sheoburan Singh from his father, in reversal of the judgment of the Principal Sudder Ameen. They however deem it proper, no rate of interest having been specified in the security bond, and in consideration of the delay which has taken place in bringing forward the claim (the former suit having been nonsuited on the 19th May 1842, and the present action not having been instituted till the 24th April 1848), to make an abatement in the plaintiff's charge of interest, under the authority of the Circular Order of the 5th May 1837. Interest on the principal sum is hereby decreed to the plaintiff from the date of the demand, viz. 15th September 1837, at the rate of five per cent. per annum. This order is not to be understood to extend so as to affect the decree which has been passed against the defendants Juggoo Singh and Bhugnoo Singh, on their confession of judgment.

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The 30th August, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 192 OF 1851. { *Special appeal from the decision of
Moulvee Mohamed Hoosein, Princi-
pal Sudder Ameen of Bareilly, dated
14th May 1851.*

—

GOLAB RAI, (*Plaintiff*), *Appellant*,
versus

BULDEE AND OTHERS, (*Defendants*), *Respondents*.

THE suit was brought for Rs. 296, principal and interest, due under a bond, dated the 15th Sawun 1252 Fuslee. Out of the six persons sued, two only appeared in the Moonsiff's Court, who failed to adduce any evidence in defence; and the Moonsiff, being

of opinion that the claim was proved from the evidence to the bond, and the other papers filed in proof of the debt, which the bond covered, decreed the suit.

In the appeal, which was preferred by all the persons sued, and which was admitted for all, without advertence to the rule in paragraph 4, Circular Order 16th April 1841, the Principal Sudder Ameen proceeded to reverse the decision on conjectural grounds, without noticing the reasons of the Moonsiff's judgment, and a special appeal was admitted, without summoning the respondent, to try, whether the decision was not imperfect.

The Principal Sudder Ameen was bound to take into consideration the reasons of the judgment of the lower Court, and to put on record his reasons for discrediting the oral and documentary evidence on which that judgment was based. He may have done so; but there is nothing in his decision to show that it was done, or to satisfy the losing party that his case had had a fair hearing. The decision is annulled, and the case remanded, in order that it may be decided on its merits. The costs will be charged as usual.

The 30th August, 1851.

Present : S. S. BROWN, Offg. Judge.

CASE No. 193 OF 1851. { *Special appeal from the decision of T. C. Plowden, Esq., Judge of Ghazee pore, dated 19th April 1851.*

SHEOUMBUR RAI AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

MUSSUMAT ROOKUMI KUOR AND OTHERS, (*Defendants*),
Respondents.

THE decision appealed from is in the printed volume of the month.

A special appeal was admitted, without summoning the respondent, to try, whether the Judge, in his decision, had adjudicated the pleas of the parties.

The suit is based on the alleged fact of possession of the hereditary share claimed by the plaintiffs up to the year 1841; and the cause of action is laid on the exclusion of the plaintiffs from the Settlement record by the act of the Collector. The fact of this possession was found by the Moonsiff; and the proof of it formed the first point to be determined in appeal, before the reason deduced by the Judge from the Circular Order of the 11th January 1839, in rejection of the suit, could be considered

On this point the Judge only incidentally observes, that "it appears that the plaintiffs never had the Settlement, so that their exclusion is no new grievance." But the circumstance of the plaintiffs' names not having appeared in previous Settlements for the one-anna share claimed by them is not conclusive against possession. The plaintiff's allegation is, that when the rights of the share in the estate came under enquiry at the time of the preparation of the Settlement record, his right was disallowed, and that his dispossession dates from that period. There has not been therefore any disposal of the first and chief point of fact at issue between the parties, and the case is accordingly remanded for retrial in advertence to the foregoing remarks. The costs will be charged as usual.

The 6th September, 1851.

Present : A. W. BEGGIE, Judge.

Case No. 232 of 1850. { *Regular appeal from the decision of Moul-
vee Mohumed Hoossein Khan, Princi-
pal Sudder Ameen of Zillah Mynpoo-
rie, dated 11th September 1850.*

MUSSUMAT RANEE BHUGHELUN, MOTHER AND GUARDIAN OF RAJAH
TEJ SINGH, A MINOR, AND SON AND HEIR OF RAJAH NURPUT
SINGH, DECEASED, (*Defendants*), *Appellants*,

versus

BUKHTMULL AND BIRJ LALL, (*Plaintiffs*), *Respondents*.

THIS was a suit to recover Rs. 19,755, principal and interest, of three expired instalments, according to a confession of judgment filed by Rajah Gunga Singh, deceased; and to establish the existence of two instalments still due thereon, amounting to Rs. 11,001: total amount of claim Rs. 30,756. Plaintiffs represent that the late Rajah Gunga Singh, of whom the minor (Rajah Tej Singh) is the representative, was indebted to them in the sum of Rs. 36,001, on a bond. Two of the instalments falling due, plaintiffs sued Rajah Gunga Singh for the amount, Rs. 4,500; eventually, an arrangement was made by the parties to the following effect: the Rajah filed a confession of judgment in the suit, under date 21st September 1841, agreeing to pay Rs. 40,001, on account of principal and interest, consolidated with the principal, and Rs. 10,000, on account of interest on the yearly instalment in advance, viz. from 1249 to 1258 Fuslee, on the condition that, if the instalments were not duly paid, interest at the rate of twelve per cent. per annum should be paid for the period by which the instalments were exceeded. A decree was accordingly passed in favor of plaintiffs for Rs. 4,500: of this sum, Rs. 2,100 have been realized, and for the recovery of the balance of Rs. 2,400, steps will be taken. Four instalments, amounting to Rs. 18,000, had been paid, agreeably to the *ikbal-dawa*, when Rajah Gunga Singh died, since that event, no further payments have been made, the Rajah's immediate successor, Nurput Singh, pleading poverty in excuse for the non-fulfilment of the engagement. Plaintiff was therefore compelled to institute this suit, to enforce his claim against Rajah Nurput Singh, and the Ranees Guhulwar, who is also a claimant to the succession of the Rajah Gunga Singh.

The defendant, Rajah Nurput Singh, in reply, ascribed the institution of the suit to the instigation of the Ranees Guhulwar, and her *chela* Mandhata, on account of the dispute between them and himself, relative to the succession. He declared that

the confession of judgment was filed on the part of the Rajah Gunga Singh through the dishonesty of his *karinda*, and the other people about him, who, surreptitiously, got possession of his seal, and by whom the Rajah's accounts, which would throw light on the transactions between that person and the plaintiffs, are fraudulently withheld; but from some detached accounts, found on a shelf in the Rajah's *daruhduree*, it appears, that only Rs. 15,000 were due to the plaintiffs, up to 1248 Fuslee, which amount included interest at 24 per cent. per annum. Through the roguery of the Rajah's *karinda*, the bond, on which plaintiffs' former suit was based, may have been executed. The plaintiffs had promised, when the Rajah filed the confession of judgment, to explain the Rajah's accounts to him, but had never done so. The plaintiffs' claim is untenable, being in violation of the law against usurious interest. He challenged the plaintiffs to produce their books, to shew that illegal interest had not been charged. The plaintiffs had allowed the Rajah credit for only Rs. 2,000 on account of the proceeds of mouzah Meroulee, being at the rate of 1000 per annum, whereas, it can be shown that the actual collections were not less than Rs. 1,300 per annum; and although the village had remained three years in plaintiffs' possession they had not credited the proceeds of the third year to the Rajah.

The Principal Sudder Ameen's decision is to the following purport. That there were four points for consideration. 1. Was there any agreement between Rajah Gunga Singh and the plaintiffs when the former entered the confession of judgment, that the latter should explain his account to the Rajah? 2. Did the bond on which the plaintiffs sued the Rajah comprize any interest, or was it only for the *principal* of a debt? 3. Had the plaintiffs collected Rs. 1,300 a year from mouzah Meroulee, as alleged by defendant, or only 1,000, as stated by themselves? 4. Did they make the collections from the village during three years, or only for two? On the first point, the Principal Sudder Ameen decided that no such agreement as that asserted by the defendant had been entered into by Rajah Gunga Singh and the plaintiffs, as it was apparent, even from the evidence of defendant's own witnesses, that a settlement of accounts had taken place between the parties prior to the execution of the bond, there was, therefore, no necessity for any fresh adjustment: had there been any such agreement, why did Rajah Gunga Singh make over the village of Meroulee to the plaintiffs? The evidence adduced by the defendant to this fact is also unworthy of credit, the witnesses being his servants and dependants, and their testimony at variance with the defendant's own statement in his reply: the witnesses say-

ing that the promise was made to the Rajah's *son*, whereas, the defendant alleged it was made to the Rajah *himself*: the witnesses also contradict one another in various particulars. On the second point, the Principal Sudder Ameen was of opinion that the defendant's allegations of illegal interest having been included in the bond was not proved, it being expressly stated in the bond itself that the amount was *principal* only: he observed also, that no such objection had ever been urged by Rajah Gunga Singh himself, neither was there any proof that the Rajah's *karinda* had acted fraudulently in this matter: the oral evidence adduced by the defendant was open to suspicion, as the witnesses were not only dependants of the defendant, and hostile to the plaintiffs, but their testimony did not agree. The detached accounts produced by defendant were utterly unworthy of credit, and appeared to be of recent preparation; nor was it, by any means, incumbent on the plaintiffs to produce their accounts. On the third point, the Principal Sudder Ameen was not disposed to rely on the statements or evidence of either party, but, from the accounts produced by the plaintiffs, it appeared that the Rajah had assigned the village of Meroulee to the plaintiffs for Rs. 1,001 per annum. On the fourth point, the Principal Sud-dor Ameen did not find that the plaintiffs had accounted to the Rajah for the collections of the *third* year, during which they held possession of the village, which sum must therefore be deducted from the plaintiffs' claim. He accordingly gave plaintiffs a decree for Rs. 15,495, principal, and Rs. 2,988-1-6, interest, to the date of the suit; total Rs. 18,432-1-6: but declined to decree for the instalments not yet due, as they were not covered by a bond. The amount of the decree, thus given, was declared to be realizable from the property left by the Rajah, and which had devolved on his heirs, the defendants.

The defendant, Nurput Singh, appealed from this decree; but dying subsequently, was succeeded by the minor, Tej Singh, whose guardian and mother, the female defendant, appeared on his behalf.

I see no reason to interfere with the above decision; the reasons for which are sound, and in conformity with the evidences. It is clear that the chief objection of the defendant, viz. the alleged agreement on the part of the plaintiffs to explain his accounts to the Rajah, at the time the latter filed his confession of judgment, is utterly groundless, for the reasons stated by the Principal Sudder Ameen. The defence set up is altogether dishonest, and supported by perjured testimony. Had there been any truth in the defendant's statement, the late Rajah Gunga Singh would not have paid four instalments, agreeably to the *ikbaldawa*. His having made these payments, without any demur,

is, in itself, a sufficient proof that a final settlement of accounts had preceded the filing of the confession of judgment. The appeal is dismissed, with costs.

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The 8th September, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 187 OF 1851. { *Regular appeal from the decision of*
Moulvee Sudder-ood-deen, Principal
Sudder Ameen of Dehlie, dated 20th
July 1850.

MUSSUMAT MANOO AND OTHERS, (*Defendants*), *Appellants*,
versus

THANOO AND OTHERS, (*Plaintiffs*), *Respondents*.

THIS suit is for the partition of a moiety of the lands of mouzah Mahmoodpore, or 10 biswahs of the estate, and for the recovery of Rs. 1,225-9, *wasildt* of eight and a half years. Total estimate of suit, Rs. 6,275-9.

The estate belongs to a large proprietary community, and comprises two *panuhs* or *puttees* of 10 biswahs each. The *panuhs* bear an equal share of the assessment, and have always been managed separately. The cultivated portion of the lands of both *panuhs* is distinct; but a portion of the uncultivated and waste land is held in common, the estate thus ranking, in its tenure, under the class of *putteedarree* properties, as defined in para. 3 of the Circular Instructions of the 3rd August 1847. The plaintiffs, who are the proprietors of one *panuh*, had repeatedly preferred claims against the other *panuh* on the score of the inequality of the land in their possession, and attempts had been made by the revenue authorities to adjust the dispute, which was at last referred, with the consent of both parties, to arbitration in 1845, and an award was given, which recognized the equity of the claim, and prescribed the mode in which the deficiency, if found, was to be made good from the common land, after the measurement. In the measurement, an excess of 89 beegahs, 15 biswahs, was found in the defendant's *panuh*, but the revenue authorities declined to enforce the award or disturb the existing status. The plaintiffs then brought a suit for the land in excess, but were nonsuited in the Court of first instance for informality. Instead of appealing from this order, plaintiffs renewed their suit in the form of a suit for partition of their entire *panuh*. The partition is claimed under Regulation XIX. of 1814, and some of the co-proprietors of plaintiffs' *panuh*, who were unwilling to join in the suit, were made co-defendants.

The Principal Sudder Ameen decreed the suit, and the appeal has been preferred by the proprietors of the other *panah* singly, the other defendants not having joined in it.

Amongst the reasons for appeal, the first for consideration is the plea that the Regulation XIX. of 1814 is not applicable to the partition of *putteedaree* properties. This was admitted by the Principal Sudder Ameen, who was of opinion that Regulation IX. of 1811 was the law under which the partition should have been claimed ; but the decree shows some inconsistency with this opinion. The respondents have clearly erred in bringing their suit under a wrong law. Regulation XIX. of 1814 is expressly limited by Section 30 to estates held in *common tenancy*, and its operation is only practicable in such properties where no separate rights exist, those kinds of property excepted for which a special provision has been made in Sections 9, 10 and 11. The decree of the lower Court could not therefore be carried into effect under the Regulation XIX. of 1814.

In the decision of the 24th April, No. 27, the Court ruled that the misquotation of the Regulation XIX. of 1814 was not a vital defect in the plaint, if its real object were otherwise shown from the pleadings. In this case, they have been left to gather, that the object of the suit is to bring the land in accordance with the share from the verbal statements of the respondents' vakeel. There is nothing in the pleadings to guide them to it. The sole object set forth in the plaint and replication is to obtain a partition under the rules of Regulation XIX. of 1814, which, as has already been shown, cannot be decreed.

It will be sufficient to advert briefly to another objection that has been raised to the decree of the lower Court. The respondents have brought their suit for a partition of the shares of other proprietors, besides their own, from the rest of the estate. There is nothing in the Regulations to authorize a suit for the division of another man's property against his will, and the contrivance of making the dissentient party co-defendants does not remove this difficulty, any more than does the silence of this party in appeal.

The Court consider that, for the above reasons, the suit cannot be proceeded with, and they are accordingly obliged to declare a nonsuit, in reversal of the decision of the lower Court, with costs.

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The 8th September, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 59 OF 1850. { *Regular appeal from the decision of Mr. J. Mercer, Principal Sudder Ameen of Furruckabad, dated 4th March 1850.*

NUWAB MOHUMED HOOSSEIN ALI KHAN AND NUWAB MOORABUCK-
OONNISSA BEGUM (*Plaintiffs*), *Appellants,*

versus

ZUMANIYA BEGUM, JOGRAJ, EESUR DASS, AND OTHERS,
(*Defendants*), *Respondents.*

THE plaintiffs in this suit are the brother and sister of the late Nuwab Mohumed Hoossein Ali Khan, and the defendant, Zumaniya Begum, is his widow. The defendant, Jograj, is in possession of part of the property sued for, as mortgagee from the late Nuwab, and the defendants, Eesur Dass and others, are auction purchasers of others of the villages. The plaintiffs state that the villages appertaining to talooqua Sukrawun were bestowed as a *jageer*, in perpetuity, on their father, Ameenood-dowla, under a *sunnud* dated 30th May 1811. On their father's death, the villages of the *jageer* and the money pension were distributed amongst his heirs, male and female: five entire villages, viz. Pygoowan, Mujjoopore, Beerpore, Reshumpore and Sekundpore, fell to the share of their deceased brother, Nuwab Mohumed Hoossein Ali Khan, who had also inherited two other of the villages, viz. Missurabad and Bhooretta, from his sister, Mohommadee Begum, and the village of Shureefabad through his first wife Ameer Begum, to whom it had been given by the Nuwab Ameerood-dowla. The late Nuwab likewise inherited three shares, out of seven, of certain other lands and *baghs*, and of the monthly allowance in virtue of his wife, on whom they had been bestowed by her mother Oomrao Begum. The five villages, which the late Nuwab inherited from his father, had been mortgaged by him to Sah Beharee Lall and Govind Lall, on the 14th February 1837. These persons had sued him, and obtained a decree in the Civil Court, and, in execution thereof, had caused the villages of Missurabad, Bhooretta and Shureefabad, to be advertized for sale. The Nuwab appeared as objector to the sale of these villages, on the plea that, under the terms of his *sunnud*, they were not liable to alienation to strangers, which plea was admitted by the Zillah Court, and, on appeal to the Sudder Court, it was decided, that the grant was intended for the benefit of the family at large, and not of a particular individual: and an order was passed in the miscellaneous

department that intimation should be given to the purchasers, that the actual rights and interests only, (*huq morafiq*) of the judgment debtor were guaranteed to them, and the sale took place, accordingly, on these conditions: many other sales of rent free lands, belonging to the Nuwab, were also effected in like manner, in execution of other decrees. The defendant, Zumaniya Begum, on the death of the Nuwab, got possession of the residue of the property, and executed a deed of sale for the same, in favor of her nephew Ali Murdan Khan, defendant. The agent to the Lieutenant Governor and the Collector divided between the plaintiffs and the defendant Zumaniya Begum, the money allowances enjoyed by the late Nuwab. The plaintiffs go on to say that, according to the religion of the *sheeas*, the defendant, Zumaniya Begum, was not entitled to any portion of the *real* property, and that as the late Nuwab enjoyed only a life interest in the property, neither Zumaniya Begum or any other of the defendants, whether mortgagees or auction purchasers, were entitled to continue in possession, but that the right in *all* the property devolved on plaintiffs.

The reply of the defendant, Zumaniya Begum, was to the effect, that the late Nuwab had pledged the whole of the property in satisfaction of her marriage dower, amounting to 5½ lacs of rupees, as had been established by an inquiry in the Political Agent's Office; until, therefore, her dower was paid, the plaintiffs could not claim possession of any portion of the property. Further, she stated, that as the childless widow of the Nuwab, she was entitled to one-fourth of the entire property; that a *futwa* of the Sudder Court's *moofee* had been obtained to that effect, and that one fourth of the money allowances had been assigned to her by the agent and Collector, in conformity therewith, that she, being a *soonnee*, could not, with reference to the provisions of Clause 9, Regulation VII. of 1832, be deprived of her rights, by the operation of the *sheea* law.

The defendant, Jograj, in his reply, urged, that he held possession, as mortgagee, under a decree of the Sudder Court, which could not be superseded by the plaintiff's suit: he observed that the words *nuslum bad nuslum* in the *sunnud* merely signified that the talooqua was irresumable by Government, not that it was unsusceptible of alienation; that grants of this nature are by prescriptive usage, transferrable, and that this *jageer*, in particular, had been repeatedly alienated, *e. g.* the original grantee, Ameen-ood-dowla, had given the village of Shureefabad to Ameer Begum, the first wife of Hoossein Ali Khan, which gift had never been objected to by the plaintiffs; that, in like manner, the villages of Puttee and Beebeepore had been bestowed on Nuwab Begum, the wife of the plaintiff, Hoossein Ali Khan

some land, also, had been given by Ameen-ood-dowla to Musamat Jeeraaj, a courtesan, on which alienation being objected to by Daneshmund Khan, a brother of the plaintiff, the female in question instituted a suit in Court, and obtained a decree for the land: other instances of alienation of portions of the grant might be given, but the above were sufficient. The Lieutenant Governor had, in a communication to the Governor General, expressed an opinion adverse to the right of alienation, but the Governor General took a different view of the question. Esur Dass and the other defendants, who had purchased several of the villages at public auction, filed replies to the same purport as that of Jograj.

The Principal Sudder Ameen decided, that the dower of the defendant, Zumaniya Begum, had been fixed, at the time of her marriage, at $5\frac{1}{2}$ lacs of rupees. This he considered to be proved by the oral testimony adduced, although no documentary evidence to the fact was forthcoming; also, that she was entitled to retain possession of the estate of her deceased husband till her dower was paid. He further admitted her claim to one-fourth of the property as the widow of the late incumbent: he overruled the plea of the plaintiffs, as to the invalidity of the marriage, in consequence of the one party being a *sheea* and the other a *soonneet*. At the same time, he recorded his opinion, that the *waseenamah* filed by Zumaniya Begum was not proved: that it had been executed at a time when the Nuwab was not in possession of his faculties, he dying only five days after its execution, from the effects of a severe illness: there was reason to suspect that his seal was surreptitiously affixed to the deed, which, moreover, was attested by the servants of Zumaniya Begum, and connections of Futteh Ali Khan, her *moohhteearkar*. With respect to the villages in possession of the defendant, Jograj, the Principal Sudder Ameen held, that the transfer was valid, and that his possession could not be disturbed till the mortgages should be redeemed; and, in support of this opinion, he quotes Section 15, Regulation XXXVI. of 1803: and referred to the correspondence which took place between the Lieutenant Governor and Governor General in 1842, relative to the *jageer* of Hafiz Ruhmut Khan, in the Bareilly district. On that occasion, the Lieutenant Governor proposed that a law should be passed, declaring that the incumbents, for the time being, did not possess the power of alienation beyond the period of their own lives; but a reply was received from the Governor General under date 14th February 1842, (filed by the defendant Jograj) expressive of his opinion, that very serious objections would exist to the enactment of such a law; and that it was inexpedient, on principle, to provide for private property of this description, any rules not applicable to all other private property, in the rents of land. A similar decision, relative to the

mauffee tenures of Kuramut Khan, in the Shahjehanpore Zillah, was come to in the year 1845. The decision of the Sudder Court, North Western Provinces, quoted by the plaintiffs, the Principal Sudder Ameen did not consider relevant to the present case, as, in that instance, there was a special proviso in the grant, that the property should descend, *undivided*, to the head of the family, for the time being. The pleas urged by Jograj, the Principal Sudder Ameen considered to be equally applicable in respect to the villages held by the defendants Esur Dass and others, the auction purchasers in execution of decrees passed against the deceased Nuwab, and he observed that it was singular that the plaintiffs, who *now* objected to the alienations made by the deceased Nuwab, should have acquiesced in the previous alienations made by the same person in favor of Ameer Begum and Nuwab Begum, as well as in those in favor of their own relatives. The practice of alienation is, therefore, clearly established for a period of thirty years. The only difference between the case of the *jageer* of Hafiz Ruhmut Khan in the Bareilly district and the present is, that the grants in the former were made, originally, by Nuwab Asoof-ood-dowla, and in the latter by Nuwab Moosuffur Jung. For the above reasons, the Principal Sudder Ameen dismissed the plaintiffs' claim, allowing the defendant, Mussumat Zumaniya Begum, to retain possession, permanently, of quarter of the property, being her share, as the widow of Mohamed Hus-sun Ali Khan, and of the *whole* property in her possession until such time as her dower should be paid: the possession of defendants, Jograj, Esur Dass, and others, were in like manner declared valid against the plaintiffs' claim, with reference to the deeds of mortgage and sale, which conferred their titles. With this decision both parties were dissatisfied and appealed: the plaintiffs generally, and Mussumat Zumaniya Begum, defendant, *because* the *wusec-utnamah* filed by her had been discredited.

The Court concur in the propriety of the Principal Sudder Ameen's decision in every point, except that of the dower of the defendant Zumaniya Begum, which the Principal Sudder Ameen considers to be proved to have been fixed at 5½ lacs of rupees. The majority of the Court are not satisfied with the evidence adduced by Zumaniya Begum on this point. The principal witnesses to the fact are the Begum's own dependents: she can produce no documentary evidence in support of her assertion, and the Court are not disposed to believe that, had such a large dower been assigned to her, there would not have been some *written* evidence to the fact, seeing that her marriage is of recent date, when the value of documentary evidence in such matters was perfectly understood. But the falsity of this part of her claim is made more palpable by the fact of the Begum's own brother and *mookhtecarkar* having, in a

petition presented by him to the Principal Sudder Ameen, in the year 1845, represented his sister's dower to be one and a quarter lac of rupees, instead of five and a half lacs, as it is *now* stated to be. The Begum's brother cannot be supposed to have been ignorant of so important a matter, appertaining to his sister's affairs, and the only conclusion the Court can draw from this very gross contradiction is, that *both* statements are equally untrue. This conviction is strengthened by the nature of the evidence produced by the plaintiffs, including the testimony of the Qazie who performed the marriage ceremony; from which it appears that *no* sum was specified as the Begum's dower. The majority of the Court agree with the Principal Sudder Ameen in finding that the defendant, Zumaniya Begum, is entitled to one-fourth of her late husband's property, both real and personal. It is shown by the numerous *futwas* filed in the case, that the Begum, as a *soonnee*, is entitled to the benefit of the law of her own sect, and were there any doubt on the subject, the Court would not hesitate to recognize the *soonnee* law of inheritance being that of the defendant, on the principle recognized in Clause 2, Section 6, Regulation V. of 1831. The Court entirely concur with the Principal Sudder Ameen in discrediting the *wusecutnamah* filed by Zumaniya Begum. The circumstances, under which this document was prepared, are most suspicious. The late Nuwab, at the date of its execution, may reasonably be supposed to have been incapable of duly executing such a document. He was on his death-bed, and died within five days from that date; and the Register of Deeds, when the document was brought to him for registry, refused to register it, being of opinion that its execution was not satisfactorily proved. It may be observed, with reference to this deed, that its fabrication tends to throw very strong suspicion on the oral evidence produced by Zumaniya Begum, in proof of her dower; for, if she and her friends did not hesitate to utter a forged will, little or no dependence can be placed on the *oral* evidence adduced by them. The *wusecutnamah* has a great number of marginal attestations, both seals and signatures; but it is worthy of remark, that only five of the witnesses were examined by the Political Agent, and those are the dependents or relatives of Zumaniya Begum. Moreover, although the deed professes to hypothecate the whole of the Nuwab's property for the payment of the Begum's dower, yet strange to say, the amount of the dower itself is not specified in the deed: an omission altogether inexplicable in such a document: neither do the Court understand how the Nuwab, having already mortgaged a considerable portion of his estate to the defendant, Jograj, could (as the deed purports,) *re-assign* that very portion to his widow. The whole transaction bears a frau-

dulent and unreal aspect. In regard to the very important question involved in this case, as to the late Nuwab's right of absolute and irrevocable alienation of the property, the Court concur in the view taken by the Principal Sudder Ameen. They have attentively considered the terms and tenor of the *sunnud* bestowed on the original grantee, the Nuwab Ameen-ood-dowla, of which alone a copy has been filed by the plaintiffs, and can discover in it no proviso, which takes it out of the category of grants described in Section 15, Regulation XXXVI. of 1803. The words *altungah*, *nuslan bad nuslan*, and *butnun bad butnun*, are to be found in it, and *sunnuds* thus worded are declared by the section above quoted to be "hereditary tenures," and "transferable by gift, sale, or otherwise." To restrict, or in any way modify the terms of that Section, would have the effect of placing these grants on the same footing as those referred to in Clause 6, Section 2 of the Regulation, by which the incumbents are prohibited from "selling or otherwise transferring them or mortgaging the revenue of the land, for a longer period than their own lives." It is quite clear that the several incumbents of this tenure have hitherto regarded themselves as having full right to alienate the same, without reference to the reversionary interests of the other members of their family; that such alienations have frequently been made without adverting to the ordinary laws of inheritance, and without any objection on the part of those who were interested in opposing the alienations. The Court cannot recognize the distinction attempted to be drawn by the plaintiffs between transfers to *members of the family* and those to *strangers*, and, moreover, it is apparent that, in the case of the transfer to the courtesan, Jeera, even this plea is not available. The Court have not overlooked the correspondence on the subject of grants of this description, which has passed between the Lieutenant Governor and the Governor General; and although, in disposing of cases coming before them judicially, they do not of course consider themselves *bound* to adopt the construction put on its grants by the Government, they are always most ready to pay due attention to the arguments put forth by such high authority, even though their own conclusions may be different. But, in the present instance, they find that the opinion of the Supreme Government, as to the unfettered character of these grants, is in accordance with their own. It does not follow that because a grant is conferred on a particular individual for the support of his family, he may not alienate it out of the family. To justify such a construction, there must be a restrictive clause in the *sunnud*. To rule, *generally*, that such alienations may not be made, would be unjust to those persons who have, from time to time,

advanced their money to the incumbents, for the time being, for the benefit of themselves and families, under the assurance that the possessors for the time being had the uncontrolled disposal of the property thus transferred. The plaintiffs' argument, that the auction purchasers, Eesur Dass and others, cannot claim possession beyond the life of the late Nuwab, under the conditions of the sale, is not tenable. It is true that two Judges of this Court, by a proceeding in the miscellaneous department, did express an opinion adverse to the incumbent's right of alienation beyond the period of his life; but, eventually, it was ordered, that the *actual rights* and interests (*huq morafiq*) of the incumbent should be sold: and it now rests with this Court, by a formal decision in a regular suit, to determine what those rights were, and the view now taken by them is, that the transfer is absolute and irrevocable.

The Court accordingly, in modification of the decision of the Principal Sudder Ameen, decree that the plaintiffs are entitled to possession of three-fourths of the property left by their brother the late Nuwab Mohumed Hussun Ali Khan, with exception of that portion which is in possession of the defendants Jograj, mortgagee, and Eesur Dass and others, auction purchasers, the remaining one-fourth being the right of the defendant, Zumaniya Begum, as the widow of the late Nuwab. The plaintiffs and the defendant, Zumaniya Begum, will retain, of course, the right of redemption of the mortgaged portion of the property. The plaintiffs will pay the whole of the costs of the defendants Jograj and others, the mortgagee and auction purchasers, and the costs between themselves and the defendant, Zumaniya Begum, will be charged rateably according to the proportion of their claim decreed and dismissed.

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The 8th September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE No. 58 OF 1850. { Regular appeal from the decision of J.
 Mercer, Esq., Principal Sudder Ameen
 of Furruckabad, dated 4th March 1850.

NUWAB MOHUMED HOOSSEIN ALI KHAN AND NUWAB MOOBARUK-
OON-NISSA BEGUM, (*Defendants*), *Appellants*,
 versus
EESUR DASS, (*Plaintiff*), *Respondent*.

THIS suit is connected with the case No. 59, this day disposed of, in which the two defendants, (appellants) were plaintiffs, and

the present plaintiff and respondent one of the defendants. The plaintiff is the auction purchaser of 8 biswahs 11 biswansees in mouzah Bijjookhariya, one of the villages comprised in the Altumgah grant of the late Nuwab Mohumed Hoossein Ali Khan, and which property was sold in execution of a decree obtained by Girdharee Lall against the Nuwab, on the 17th July 1848. The plaintiff states that the village had belonged to Ameer Begum, the first wife of the Nuwab, and, on her death was divided among her heirs, three shares out of seven falling to the Nuwab. In consequence of the opposition made by the defendants, however, plaintiff had been unable to obtain possession of the property sold to him. He was therefore compelled to institute this suit for possession, and for the recovery of the *mesne* proceeds, from the date of the auction sale, amounting to Rs. 1,422-12-5.

The defendants, in reply, stated, that the village in question formed part of the *jageer* confirmed in perpetuity on Oomrao Begum by the British Government. The Begum bestowed it on her daughter Ameer Begum, the first wife of the late Nuwab Hoossein Ali Khan, who, in right of his wife, succeeded to three-seventh of the village; but they pleaded that the village formed part of a *jageer* in which the incumbents possessed only a life interest, it being contrary to the intent of the donors, (the Government,) that any portion of the village should pass out of the family. On the property being advertized for sale, in execution of the decree against the Nuwab, defendants appeared as objectors, and the plaintiff, consequently, purchased it at his own risk, the question as to the limitation of the incumbent's rights having been decided by the order of the Sudder Dewanny Adawlut in the case of Jograj, mortgagee of Pygoan. The defendants also pleaded that no suit lay against them for *mesne* proceeds, as they were not in possession, which was held by the other defendant in the case, Mussumat Zumaniya Begum.

The Principal Sudder Ameen, with reference to his decision in case No. 59, passed a decree in favor of the plaintiff, exempting the defendants, Mohumed Hoossein Ali Khan and Moobarukoon-nissa Begum, however, from the demand of *wasildt*, it being shown that not they, but the other defendant, Zumaniya Begum, was in possession of the property.

The defendants appealed from this decision, on two grounds: 1stly, that the late Nuwab had only a life interest in the estate; and 2ndly, that as they were not in possession, they should not have been charged with costs.

The decision of this suit is of course involved in that of the case No. 59, this day decided, in which the claim of the present defendants, Nuwab Mohumed Hoossein Ali Khan and Nuwab

Moobaruk-oon-nissa Begum, to this property in common with the other villages and lands in possession of the auction purchasers has been dismissed. It is only necessary therefore to refer to that decision for the reasons which have influenced the Court in pronouncing their judgment. They confirm the decision of the Principal Sudder Ameen, considering that, from the tenor of the defence adopted by the appellants, they are justly charged with the plaintiff's costs. Had they not disputed his right, the case would have been different.

The appeal is dismissed, with costs.

The 8th September, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 154 OF 1850. { *Regular appeal from the decision of Mr. J. Mercer, Principal Sudder Ameen of Furruckabad, dated 4th March 1850.*

ZUMANIYA BEGUM, *in formd pauperis,*
 (Defendant), Appellant,
versus

NUWAB MOHUMED HUSSUN ALI KHAN, AND NUWAB MOOBARUK-
 OON-NISSA BEGUM, (Plaintiffs), Respondents.

THIS is a cross-appeal from the defendant, Zumaniya Begum, in the preceding suit in regard to that part of the Principal Sudder Ameen's decision, which discredits the *wuseeutnamah* filed by her. For the reasons detailed in the preceding judgment, her appeal is dismissed with costs.

The 8th September, 1851.

Present: { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 155 OF 1850. { *Regular appeal from the decision of Mr. J. Mercer, Principal Sudder Ameen of Furruckabad, dated 4th March 1850.*

ZUMANIYA BEGUM, *in formd pauperis,* (Defendant), Appellant,
versus

EESUR DASS, (Plaintiff), Respondent.

THIS is a separate appeal in the preceding case No. 58. For the reasons given in the case No. 59, the appeal is dismissed with costs.

The 10th September, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, } *Offg. Judge.*

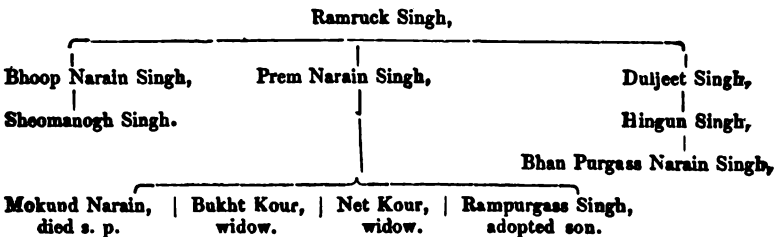
CASE No. 147 OF 1850. { *Regular appeal from the decision of*
Abdool Ruhnman Khan, Principal Sud-
der Ameen of Benores, dated 8rd June
1850.

BHAN PURGASS NARAIN SINGH AND OTHERS,
(Plaintiffs), Appellants,
versus

**RAMPERGASS SINGH, THAKOOR DUTT SINGH AND OTHERS,
(Defendants), Respondents.**

THIS suit has been brought for possession of one-sixth of the talooqua of Juknee, that is, for one-half of the one-third *puttee* formerly held by Prem Narain; and to recover *wasildt* from 1247 to 1256 Fuslee, amounting to Rs. 18,534-13. The claim is made to rest on the *roobakarees* of the Calcutta Sudder Court, dated respectively the 20th July and 27th September 1831. The full value of the suit is Rs. 24,975-9.

A pedigree is given by the plaintiffs as underneath.



The chief plaintiff, Bhan Purgass Narain Singh, is half brother of the defendant Rampergass Singh. The property in dispute, viz. one-half of the *puttee* of Prem Narain Singh, which passed from him to his widows and to Rampergass Singh, was purchased at auction sale by the defendant Thakoor Dutt Singh.

The plaint sets forth that Ramruck Singh was owner of the entire estate, and that he left three sons, Bhoop Narain Singh, Prem Narain Singh, and Duljeet Singh. The two elder sons died, and, in 1197 Fuslee, the Settlement was made at a fixed jumma with the third son, Duljeet Singh. In September 1797, Sheomanogh Singh, son of Bhoop Narain Singh, sued Duljeet Singh for possession of one-half of the talooqa. Mussumat Bukht Koonwur and Net Koonwur, the widows of Prem Narain Singh, brought a suit against Duljeet Singh and Sheomanogh Singh on

the 30th May 1799, for a third share in the talooqua, on the plea of their right to succeed to the property of their husband, and on the plea that Rampergass Singh had been adopted by him. The suit brought by Bukht Koonwur and Net Koonwur resulted in a decree in their favor. Sheomanogh Singh, who had sued for one-half of the talooqua, got a decree, in 1802, for one-third share of it. In virtue of these decisions, the talooqua was divided into three *puttees*; one *puttee* fell to Sheomanogh Singh, another to the widow of Duljeet Singh, the third to Mussumat Bukht Koonwur and Net Koonwur. Mussumat Bukht Koonwur died; and Rampergass Singh having possessed himself of the whole of that *puttee*, on the strength of his so called adoption by Prem Narain Singh, Sheomanogh Singh sued Rampergass Singh and Mussumat Net Koonwur for the whole of that *puttee*; and Hingun Singh (father of the plaintiff Bhan Purgass Narain Singh) also brought suit for the whole of that *puttee* against Rampergass Singh and Mussumat Net Koonwur. On the 7th September 1827, the claim of Hingun Singh was disposed of by *razeenamah*, and, on 31st January 1828, the claim of Sheomanogh Singh was dismissed. Sheomanogh Singh preferred an appeal to the Sudder Court at Calcutta. Hingun Singh applied on 7th January 1828 for a review of judgment. An application for permission to review was made by the provincial Court on the 31st May 1828, and, on 11th August 1828, the Court were directed to submit a report in English in the usual manner, stating their reasons for applying for a review of judgment. The presidency Court, by decisions dated 20th July and 27th September 1831, reversed the judgment passed on the claim of Sheomanogh Singh, and gave him a decree for half of the contested *puttee*; a determination of the right to the remaining half being made to depend on the decision which might be come to on the disposal of the application for review of judgment. The Sudder Court at the same time pronounced unfavorably on the claim of Rampergass Singh to succeed as the adopted son of Prem Narain Singh. Sheomanogh Singh put his decree in execution, and got possession of half of the *puttee*. Rampergass Singh remained, as before, in possession of the other half of the *puttee*. On the 31st December 1831, one Mirza Ali brought a claim against Rampergass Singh, Sheomanogh Singh, and Hingun Singh. Hingun Singh did not answer. On the 3rd September 1832, a decree was passed in Mirza Ali's favor, specially against Rampergass Singh, but not against the property. Rampergass Singh fell into balance, and the one-sixth of the talooqua in his possession was let in farm for five years. Owing to some trickery, the one-sixth share was advertised for sale in satisfaction of the decree of Mirza Ali. Hingun Singh appeared

as objector, and on 23rd February 1837, the sale was stayed. The objection was subsequently overruled, the sale was directed to take place, and on 21st August 1837, the rights of Rampergass Singh were sold, and purchased by the defendant in this action, Thakoor Dutt Singh. On the 27th February 1838, Hingun Singh's objection, again made on the plea of dispossession of his rights, was set aside. The Calcutta Sudder Court having, in their proceedings dated 20th July and 27th September 1831, expressly allowed the right of Hingun Singh; Rampergass Singh having since admitted the claim; it having been uniformly insisted on by Hingun Singh; and the possession of Rampergass Singh having been a wrongful possession, the plaintiffs urge that they are entitled to sue with reference to Section 14, Regulation III. of 1793; Section 18, Regulation VIII. of 1795, Construction No. 65, and Clauses 2 and 4, Section 3, Regulation II. of 1805. They plead that the decision now come to by the Principal Sudder Ameen is directly opposed to the view taken by the Presidency Court, and that as Rampergass Singh had no rights in the *puttee*, the auction purchaser is in illegal possession.

It is answered by Thakoor Dutt Singh that there was no irregularity in the sale; that the suit is barred by lapse of time; that the claim on the *puttee* of Hingun Singh was disposed of by *bazdawa* on 7th September 1827; and that, consequently, a suit for the same property cannot now be brought by Hingun Singh's son. The Regulations quoted by the plaintiff do not in any way apply, for the son cannot claim what the father formally surrendered. The application for a review of judgment was disallowed on 21st December 1837. Hingun Singh never had possession in any shape, and in the appeal case which was tried in Calcutta, Hingun Singh was neither plaintiff nor defendant. After possession by Mussumat Net Koonwur, came possession by Rampergass Singh; after him came that of a mortgagee; after him of a Government farmer, and lastly after the sale by auction, came the possession of this respondent. The plaintiffs admit that Mirza Ali included Hingun Singh in his suit; the failure, then, of Hingun Singh to reply affords satisfactory proof of the real character of the *bazdawa* which Hingun Singh had put in, and it is clear that up to that time, at least, Hingun Singh considered himself bound by the *bazdawa*. If Hingun Singh were in possession, why did he not prevent the transfer to a Government farmer, by paying up the balance? It cannot be a ground of suit that an application for a review of judgment was filed.

The Principal Sudder Ameen observed that the plaintiffs themselves allow that they have not received any portion of the *malgoo-*

zaree profits within twelve years, though their replication makes it appear that they received a part of the *sayer* produce ; and they urge that the objection, as to limitation, is got over by the expressed opinion in favor of Hingun Singh of the Presidency Court, and by the fact that the possession of Rampergass Singh was possession by force. The Principal Sudder Ameen considered it to be quite clear, however, that as Hingun Singh was not a party to the suit in the course of the decision of which the Sudder Court at Calcutta recorded an opinion favorable to the pretensions of Hingun Singh, that opinion could not be taken into present consideration, and, as respects the plea of forcible occupancy by Rampergass Singh, the Principal Sudder Ameen was of opinion that it is not sustainable, no complaint on that head having been anywhere preferred, and the claim of Hingun Singh, of whatever value it may have been originally, having been extinguished by the tender in 1827 of the *bazdawa*. The suit in which the *bazdawa* was entered up is essentially the same with the present suit. The plaintiffs urge indeed, that Mirza Ali made Hingun Singh a defendant on the ground of Hingun Singh's possession ; but this plea, under the view taken by the lower Court, is idle, the plaintiffs having themselves admitted that Hingun Singh drew no share of the *malgoozaree* profits, and though the fact that Hingun Singh was in possession of *julkur* and *bunkur* is contended for in the pleadings, the Principal Sudder Ameen held the averment to be unsupported by adequate proof, especially as Hingun Singh declared in the body of the *bazdawa* that he had placed Rampergass Singh in full and exclusive possession. The review of judgment applied for was not granted, and the lapse of more than twelve years since the application was made does away with any argument that might be founded on the fact that the application was made. Certain petitions adverted to by the plaintiffs as having been given into Court when Mirza Ali's suit was pending, the lower Court held to be entirely valueless for the purpose of warding off the penalty, which attaches to default to sue within the prescribed legal period. The suit was dismissed, as barred by the limitation law.

The substance of the pleas in appeal are as follows. The Principal Sudder Ameen erred in allowing any opinion on the merits to accompany his order for dismissal under the statute of limitations. In the judgment of the lower Court, two points have been insisted on, the bar by lapse of time, and the tender of the *bazdawa* ; but neither of these, it is urged, is adverse to the claim. If the period is calculated from 1831 (the date of the decision of the Calcutta Sudder Court on the appeal of Sheomano Singh) the appellants are within the legal time for bringing

suit under Section 8, Regulation II. of 1805. The right of Hingun Singh, as opposed to the adoption of Rampergass Singh, was recognized by the Presidency Court, and Rampergass Singh having no where shown, since the date of the Sudder Court's judgment, that Hingun Singh had no rights, the possession by force of Rampergass Singh is clearly made out. So earnest was Hingun Singh in his endeavors to obtain *kuboolecuts* from the *assamees*, that the disputes which took place on that occasion eventually led to the imprisonment of Hingun Singh in the criminal Jail. When Mirza Ali applied to bring the property to sale, Hingun Singh objected that the property was his; he put forward the decree of the Sudder Court; he, in short, did all that it was possible for him to do in the way of proving his title. Further, it is laid down by Section 14, Regulation III. of 1793, and Section 8, Regulation VII. of 1795, that if a defendant admits the justness of a claim within twelve years from the date of suit, the claim may be heard, and since Rampergass Singh has admitted this claim, and it has been held to be a good claim by the Presidency Court, the finding of the Principal Sudder Ameen, that the suit falls under the limitation law, is clearly erroneous. Until the sale took place in 1837, Hingun Singh derived a share of the *sayer* produce, and twelve years have not elapsed since that time to the date of suit. The *bazdawa* should be placed out of sight altogether, as having nothing whatever to do with this case. The costs of suit, it is likewise argued in appeal, have been wrongly charged, because, though separate answers were filed by the defendants, they were to the same purport, and, under the rules in force, the fees receiveable by one vakeel only should have been sanctioned by the Court below.

In the opinion of the Court, the judgment of the Principal Sudder Ameen must be affirmed. It might indeed have been held by the lower Court not that the suit falls under the limitation law, but that, as it differs from the claim brought by the father of Bhan Purgass Narnin Singh in 1827, only in respect to the extent of the interest sought to be recovered, that suit having been brought for possession of the whole *pultee*, and the present suit for possession of one-half of it, and as the suit in 1827 terminated in a *bazdawa*, or formal withdrawal of the claim, and as the subsequent application for a review of judgment was disallowed, there exists no legitimate ground of action whatever. The cause might have been regarded by the Principal Sudder Ameen as one which has been heard and determined, and, therefore, under Sections 12 and 16 of Regulation III. of 1793, not entertainable by a Civil

Court. But if it be assumed that any thing contained in the judg-

* " Under these circumstances, I hold that the third share of the talooqua in dispute is divisible among the heirs of Prem Narain. Now apparently those surviving, on the death of Net Koonwur, are the appellant, (Sheomanogh Singh) and Hingun Singh, father of the respondent, (Rampergass Singh) who have equal interests. I propose therefore to amend the decision of the lower Court by awarding appellant one-half of the claimed share; costs to be ratably paid by the parties. Hingun Singh had also prosecuted his son in regard to the same share, and his action had been disposed of by the Court; as if retracted; but the Court had applied to review this order. As it seemed therefore that no adjustment had taken place between the father and son, Mr. Turnbull did not deem it necessary to make any provision as to the share to which Hingun Singh seemed entitled. The case was next heard by Mr. Shakespear, who concurred in the propriety of the decree."

ment* of the Presidency Court, dated 20th July 1831, (of which an extract is given in the margin,) taken in connection with the application for a review of judgment, has placed the plaintiffs in a position to revive the claim, which was formerly advanced by Hingun Singh and disposed of; the new suit should undoubtedly have been brought within twelve years

from the asserted cause of action. The application for a review of

* Construction No 813.

judgment was a proceeding in the miscellaneous department, and a miscellaneous*

application does not operate to save the legal *laches*. This difficulty is necessarily in no way diminished by a reference to any of the other objections and petitions in the same department put in from time to time by Hingun Singh. If the fact of possession be looked to, it is abundantly clear that Rampergass Singh maintained uniform adverse possession, under an apparently just and honest title, from the date on which the *bez-dava* was filed by Hingun Singh up to the time when the property passed into the hands of the auction purchaser. On this point of possession, the pleas of the appellants are not consistent: they affirm that Hingun Singh was in possession of the *sayer* produce; that he thus enjoyed a possession, which the law recognizes as sufficient to bring the claim within the legal limit, and yet at the same time they point attention to the fact that the occupancy of Rampergass Singh was forcible, and that therefore the provisions of Section 3, Regulation II. of 1805 are citeable in support of their case. The Court do not find, with reference to the plea of the appellants, that the Principal Sudder Ameen has expressed an opinion on the merits in association with his order of dismission under legal bar, that that officer has entered any farther into the merits than was necessary to an exposition of his reasons for declaring the suit to be barred; neither do the Court admit the validity of the objection raised as to the costs. Separate replies were filed by parties who were

impleaded on the ground of their being inferior sharers under the auction purchaser, Thakeor Dutt Singh. They denied that they were sharers under him; they could not unite with him in a common defence, and they were needlessly impleaded; consequently, the plaintiffs became justly liable for the separate costs of these parties. The Court dismiss the appeal.

The 10th September, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 111 OF 1851. { *Special appeal from the decision of G. F. Harvey, Esq. Judge of Cawnpore, dated 22nd February 1851.*

MUNNEERAM, *Tewarree, (Defendant,) Appellant,*

versus

SOBHA SINGH (*Plaintiff*), *Respondent.*

THE volume of printed decisions for February 1851 contains the particulars of this case.

A special appeal was admitted to try, whether the order of the Judge, that each party pay his own costs, is not opposed to judicial usage, the Judge having, in appeal, reversed the decision under which the plaintiff had obtained a decree.

The Court are of opinion that although it is conformable to judicial usage to charge, in ordinary cases, costs to the losing party, a discretionary power is nevertheless vested in the Courts of deviating from that practice, whenever, for reasons assigned, they may see occasion to do so. Section 27, Regulation XXVII. of 1814 contains this injunction. "Such costs and expences shall be ultimately charged to the parties cast, or to the parties respectively, in such proportions as the Court may deem equitable." In the case with which the Court are now dealing, the Judge writes,—“and, moreover, although in strictness of law the plaintiff's claim cannot stand to recover the balance overpaid, yet in practice I think it equitable to divide the costs, as undue advantage appears to have been taken of the plaintiff, whose payment would in fairness have released a larger portion of the land than he at present holds, and thus payment as well as the land pass to the defendant.” Without at all committing themselves to an approval of the Judge's reasons for compelling the appellant to bear a portion of the costs, the Court hold it to be enough, under the law above quoted, that the Judge has deemed it equitable to make such order, assigning certain rea-

sons for it ; consequently, his proceeding does not afford a ground of special appeal. The appeal is dismissed.

The 10th September, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 191 OF 1851. { *Special appeal from the decision of*
 C. Allen, Esq., Judge of Furrucka-
 bad, dated 28th August, 1850.

KOSHALIE AND OTHERS (*Plaintiffs*), *Appellants,*
 versus

MUSSUMAT SIENEE AND OTHERS, (*Defendants*), *Respondents.*

THE particulars of this claim are given in the usual place in the volume of printed decisions.

A special appeal was granted to try, whether the Judge was right in declaring the widow, Mussumat Sibnee, competent to alienate the property left by her husband.

The Court find the Judge to rule the fact that in this case the property in dispute was ancestral, was separately possessed by the husband, and descended from him to his widow in separate possession. The Judge goes on to declare that the widow "has not a right to alienate property thus acquired to a stranger, but that she has a right to make it over to her son-in-law, who would be the next heir, if his wife, the daughter, lived."

With reference to this doctrine, the Court called for a *hyewustek* from the Hindoo Law Officer of the Sudder Court. The answer received from him is to this effect. "Ancestral property held separately by the husband, and so descending from him to his childless widow, may be alienated by the widow for worthy purposes, not for frivolous or immoral purposes."

Under this exposition, the power of alienation is general, unless the case can be brought under the reservations specified ; and the Judge was right when he held that the widow might alienate to her son-in-law, and only wrong when he restricted the alienation to the son-in-law, and declared that the property could not lawfully pass to a stranger. The Court accordingly dismiss the appeal.

The 10th September, 1851.

Present : S. S. BROWN, Offg. Judge.

CASE No. 199 OF 1851. { *Special appeal from the decision of J. S. Clarke, Esq., Judge of Azimgurh, dated 8th March 1851.*

BABOO LUCHMUN SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

IKRAM ALI KHAN, (*Defendant*), *Respondent*.

THE decision appealed from is in the printed volume for the month.

The special appeal was admitted to try, whether the order of nonsuit passed by the Judge was correct in law.

It has lately been ruled in a judgment of this Court dated the 29th July No. 160, in a case precisely parallel to the present one, that a suit brought to establish a right under an award of arbitrators appointed in conformity to Regulation IX. of 1833 should be tried by the Courts on its merits. The decision is equally applicable to this case. The Judge's decision is accordingly annulled, and the case is remanded for a regular hearing and trial. The costs will be charged as usual, and the stamp fee will be refunded.

The 10th September, 1851.

Present : S. S. BROWN, Offg. Judge.

CASE No. 200 OF 1851. { *Special appeal from the decision of J. S. Clarke, Esq., Judge of Azimgurh, dated 10th March 1851.*

BABOO LUCHMUN SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

SUMBUL RAI AND OTHERS, (*Defendants*), *Respondents*.

THE reasons and order of remand are the same as in the case No. 199, disposed of to-day.

The 10th September, 1851.

Present : B. S. BROWN, Offg. Judge.

CASE No. 201 of 1851. { *Special appeal from the decision of J. S. Clarke, Esq., Judge of Azimgarh, dated 10th March 1851.*

BABOO LOCHMUN SINGH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

SHEIKH AHMUD ALI AND OTHERS, (*Defendants*), *Respondents*.

THE reasons and order of remand are the same as in the case No. 199, disposed of to-day.

The 11th September, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges*,
S. S. BROWN, Offg. Judge.

CASE No. 114 of 185 . { *Special appeal from the decision of A. Lang, Esq., Judge of Allahabad, dated 28th March 1851.*

SHEIKH AMEER ALI AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

BISAN BEEBEE AND OTHERS, (*Defendants*), *Respondents*.

THE printed volume of decisions of the Zillah Courts gives the details of this case in the customary place.

A special appeal was granted to try, whether the Judge has not decided in opposition to the *futwa*; also, whether, with reference to the Judge's order for dismissal of the claim, it would be open to the plaintiffs to revive their suit, as the Judge supposes, consistently with established judicial usage.

On the first point of the certificate, the decision of the Judge is obviously opposed to the *futwa*. The Court observe, however, that the point for trial by the Moonsiff, viz. "whether the plaintiffs having allowed Bisan Beebee's title and possession at the Settlement in the whole of her deceased husband's estate, does or does not bar their present claim," by no means involved the necessity of a demand for a *futwa*; it embraced no question of Mohomedan law, on which a reference was necessary under Clause 1, Section 16, Regulation III. of 1803, but was a simple question of fact, on which the Court was at liberty to form its own conclusions on the evidence before it. To direct the Law Officer to solve such a question by a *futwa* is to call upon him to pro-

nounce a distinct opinion on the merits of the case. The suit was brought to establish a claim under the ordinary law of inheritance, and it was for the Moonsiff to determine whether the claim was established or not, and whether the mere assent of the plaintiffs to the entry in the Settlement record of Bisan Beebee's name in place of her deceased husband can be construed to impose on the plaintiffs a disability to sue for their rights, whenever they may think proper to do so, under the recognized Mohumedan law of succession.

With regard to the second point in the certificate, the Court are of opinion that the Judge is in error. The Judge writes, "I hold that the plaintiffs' claim should be dismissed with reference to the Qazee-ool-quzat's *futwa*, or the precedent cited by the Moonsiff, for it will be time to consider those documents, as to how far they bear on the plaintiffs' claim to three fourths of their deceased brother's estate, when the plaintiffs, *stating the real facts of the case*, sue to establish their title by inheritance, which this decision is not intended to prevent their doing." But a Civil Court cannot dismiss a suit on the ground that what is set down in the petition of complaint is false, with a reservation in favor of a re-hearing of the same suit when the suitor makes such a new statement as the Judge trying the claim may deem to be true. If this practice were allowed, there would be nothing to bar the hearing of the same suit several times over; the prospect of its final adjudication being exactly contingent on the acceptance by the Judge of what he might choose to regard as the correct version of the facts. The Court need not dwell on the untenableness of such a position.

There is an apparent misprint in the passage above extracted from the Judge's decision. Instead of the words "with reference to the Qazee-ool-quzat's *futwa*, or the precedent cited by the Moonsiff," the Judge wrote, or meant to write, "*without reference*" &c.

The decisions of both the lower Courts are annulled, and the suit is remanded to the Moonsiff's file in order that he re-try it, with reference to the foregoing observations.



The 15th September, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 117 OF 1851. { Special appeal from the decision of J.
Lean, Esq., Judge of Mooradabad, dated
11th February 1851.

SAHOO DEOKEENUNDUN, (*Plaintiff*), *Appellant*,
versus

SYED MOOUZZUM ALI AND OTHERS, (*Defendants*), *Respondents*.

FOR the particulars of this case see pages 41 to 43 of the printed decisions for Zillah Moradabad for the current year.

A special appeal was admitted to determine, whether the Judge's opinion, that in this case "the demand of interest under the provisions of Act XXXII. of 1839, is untenable," be agreeable to law or otherwise.

The Court feel themselves unable to maintain the decision of the Judge or to acquiesce in the reasoning on which it is based. It does not appear to them that Act XXXII. of 1839 at all bears upon the case. The Principal Sudder Ameen decreed the *principal* of the debt, and the Judge records his opinion that the Principal Sudder Ameen "did right" in doing so. If therefore the *principal* was fairly due, there seems no reason why the interest thereon should not be claimable agreeably to established usage, which it was not the intention of Act XXXII. of 1839 to interfere with. On the contrary, it is specially provided by the Act in question, "that interest shall be payable in all cases in which it is now payable by law." The Act was not intended to take away the right to interest in cases in which it was customary to demand it, but to define the mode in which interest should be calculated in particular cases not heretofore provided. The Act is in fact an adaptation of the English Enactment of the 3 and 4 William IV. chapter 42, section 28, and was, it is believed by the Court, intended mainly to provide for payment of interest on shop bills and debts of that description on which interest was not demandable in the absence of a specific agreement, and it cannot be made applicable to such transactions as that which forms the ground of the present suit, in which the claim to interest must be disposed of, as it would have been had Act XXXII. of 1839 never been passed.

The Court, therefore, being of opinion that the Judge has misapprehended the intent and purport of the Act, under the provisions of which he appears to have considered himself bound to

dismiss the plaintiff's claim to interest, annul his decision, and remand the suit, in order that he may reconsider his judgment, and pass a fresh decision with advertence to the foregoing exposition of the Court's opinion.

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The 15th September, 1851.

Present: { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 108 OF 1851. { *Special appeal from the decision of C.*
 C. Jackson, Esq., Judge of Meerut,
 dated 18th January 1851.

MOHUMED ZUHOOR ALI KHAN AND SUMBUT SINGH, (*Plaintiffs*),
Appellants,
versus

TARA SINGH AND OTHERS, (*Defendants*), *Respondents.*

FOR the Judge's report of this case, see pages 9 and 10 of the printed decisions of the zillah for the current year.

A special appeal was admitted to determine, "whether the Judge was justified in dismissing the petitioner's suit for the reasons assigned by him, they having obtained a decree in their favor in the Court of first instance, of which they sought the partial amendment, and no appeal therefrom having been preferred by the defendants."

The Court are of opinion that the Judge's proceeding in dismissing the plaintiff's suit, *in toto*, was irregular. The plaintiffs had obtained a decree from the Moonsiff, but it was shackled with a condition, which, in their opinion, was opposed to judicial usage, and they appealed to the Judge with the view of having this defect in the decree amended. The opposite party preferred no appeal. It behoved the Judge, therefore, to confine his attention to the matter brought before him by the appellants, and either to maintain the Moonsiff's decree in its integrity or to make the amendment prayed for. He was not justified in passing an order which placed the appellants in a more disadvantageous position than they would have been in had they not appealed. The Court accordingly annul the decision of the Judge, and remand the suit, in order that he may deal with it in the manner above indicated.

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The 15th September, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 197 OF 1851. { Special appeal from the decision of
 Mohammed Kureem-oollah Khan, Prin-
 cipal Sudder Ameen of Agra, dated
 14th March 1851.

JOHN LAMBOURN, (Defendant), Appellant,
 versus

KUNHYA LALL, AND OTHERS, (Plaintiffs), Respondents.

THIS was suit to recover Rs. 44-4, principal and interest of a debt. Plaintiffs state that the defendant on the 1st December 1845, borrowed Rs. 30 from them on the security of Mr. J. P. Conolly, under a promise to repay the amount, with interest at 12 per cent. by the 1st February 1846, giving an acknowledgment under his own hand, which was countersigned by Mr. Conolly. The last named person has since demised, leaving no property; and the defendant, though frequently importuned for payment, has left the debt unsatisfied.

The defendant, in reply, denied the truth of the plaintiffs' claim, and that he ever received a cowree from them, as a loan, or got Mr. Conolly to be his security. The Rs. 30 in question, he alleged, was advanced to him by Mr. Conolly, on pledge of certain articles belonging to defendant. This debt he had subsequently repaid, and held Mr. Conolly's receipt for the same. Defendant cannot say where Conolly got the money which he lent to him.

The Moonsiff of Agra, Mr. R. Garland, gave a decree in favor of the plaintiffs, on the strength of what he designates the defendant's *receipt* for the Rs. 30, the execution of which, by the defendant, he considered to be established. This decision was affirmed, on appeal, by the Principal Sudder Ameen.

A special appeal was admitted to try, "whether the Moonsiff and Principal Sudder Ameen were justified in giving plaintiffs a decree in consideration of a document, which, being on unstamped paper, was not legally admissible as evidence."

The Court find, on examining the document, in consideration of which the lower Courts have given plaintiffs a decree, that it is not a mere *receipt*; had it been so, the amount being below Rs. 50, it would have been admissible in evidence, under Article 45, Schedule A, Regulation X. of 1829, although on unstamped paper. The document is in fact a *promissory note* for Rs. 30,

payable three months after date, and should therefore have been written, (agreeably to Article IV. of Schedule A.) on a stamp of one-anna value. The lower Courts, therefore, have contravened the law, and overlooked the Circular Order of the 7th January 1842, by receiving this unstamped promissory note in evidence, in support of the plaintiffs' claim. The Court accordingly annul the decisions of both the lower Courts, and remand the case to the Moonsiff, in order that he may proceed in the manner indicated by paragraph 7 of the Circular Order above referred to, viz. by "exercising his discretion in regard to granting or not granting the party, who presented the deed, an opportunity of remedying the defect in it, in the mode laid down in Rules 1 and 2, as either may apply, and by disposing of the case accordingly."

The 15th September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

CASE No. 188 OF 1851. { *Special appeal from the decision of Moul-
vee Kureem-oollah Khan, Principal Sud-
der of Agra, dated 11th April 1851.*

MOHUN AND OTHERS (*Defendants*), *Appellants*,
versus.

LOUTUN AND OTHERS, (*Plaintiffs*), *Respondents.*

THIS suit was brought to obtain a division of 3½ biswahs in a 5 biswah share of mouzah Bhudonuh, and a decree was given by the Moonsiff, which was upheld by the Principal Sudder Ameen in appeal.

A special appeal was admitted to try, whether the decree of the lower Courts for division of the interests represented by fractions of a beegah in a *Bhyacharah* mouzah is consistent with law and precedent.

The Court observe that this objection to the suit was urged in both the lower Courts, but that it was not noticed. The description of tenure under which the estate ranks has been shown from the copy of the *Wajib-ool-arz*, or settlement agreement, which has been filed by the appellant. The mouzah is an imperfect *putteedaree* property, a term which has been defined and explained in the Circular Instructions of the 3rd August 1847, No. 1050. It comprises three *thokes*, or sub-divisions, and each *thoke* is held and cultivated by a proprietary body. Some land is held in common by the proprietors of the three *thokes*, and

there is a specific provision in the *Wajib-ool-urz*, which prescribes the rule to be followed in the event of a division of this land being called for. This agreement, it is clear, did not contemplate any other kind of division than a separation of the actual holdings in fields, and the apportionment of the common land, for the *thokes*, according to the recorded shares, and for the individual shares in each *thoke*, in the proportion of their holdings. The suit, which has been brought for a division of an individual share in one of the *thokes* in fractions of a beegah, is therefore not only opposed to the general rules appended to the Circular Order of the 24th March 1842, that any claim to, and in, a *Bhyacharah* community must be regulated by the actual holdings, and not by hereditary shares, or nominal interests, which are equally applicable to suits for division, but it is at variance with the express conditions in the *Wajib-ool-urz*, and the decree, under the existing constitution of the village, would be found incapable of execution. The Court accordingly nonsuit the respondents with costs.

The 15th September, 1851.

Present : { A. W. BEBBIE, } Judges.
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE NO. 15 OF 1851. { Special appeal from the decision of
 S. G. Smith, Esq., Judge of Banda,
 dated 27th March 1851.

THE COLLECTOR OF BANDA, (Defendant), Appellant,
versus

MUSSUMAT CHOONA, (Plaintiff), Respondent.

THE decision appealed from is in the printed decisions of the month.

The plaintiff brought an action to contest a revenue demand of Rs. 657-14, and further sued, in an amended plaint, to remove an attachment of a house, valued at Rs. 500, which had been made in pursuance thereof. The liability of the plaintiff to the demand was decided in favor of defendant, but the attachment was declared to have been irregularly made, and, in the apportionment of the costs, defendant was charged with Rs. 98-12-7, out of the total costs of Rs. 113-13-9. In appeal by the defendant, the Judge, being of opinion that the real point at issue between the parties in appeal was the question of the costs alone, held that the plaintiff should have been declared liable for the whole costs of suit, and decreed accordingly, but charged the appellant with

three-fourths of the costs in appeal, on the ground of the appeal having been overvalued by him at Rs. 500, instead of at the amount of the costs, or Rs. 98-12-7, for which he had been made responsible.

From this part of the Judge's decision a special appeal was preferred, which was admitted to try, whether the order regarding the costs was correct, and in accordance with the practice of the Courts.

The Court, on reference to the reasons of appeal preferred in the Judge's Court, find the Judge to be in error in supposing that the appeal was confined to the matter of costs. The appellant sought for a reversal of the judgment of the lower Court as far as it affected him, and the only course open to him was to value the appeal as he did. The Judge has purposely waived any decision on the merits of the subject of the appeal, but until the merits be entered into any order passed regarding the costs will necessarily be imperfect. The case is remanded to the Judge's Court, who will dispose of it on re-trial in advertence to these remarks. The stamp will be refunded, and costs charged, as usual.

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The 16th September, 1851.

Present : { A. W. BEGBIE, } Judges.
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE No. 76 OF 1851. { Special appeal from the decision of
 Mohumed Hoossein Khan, Principal
 Sudder Ameen of Bareilly, dated
 6th July 1851.

MUSSUMAT BRIJA, (*Plaintiff*), *Appellant*,
versus

JEWUN SUHAI AND OTHERS, (*Defendants*), *Respondents*.

It appears from the record of this case that the property of Fakeerchund, husband of the plaintiff, was ordered for sale, in satisfaction of a decree, in 1844. The sale did not, however, take place, and the case was struck off the file of the Court in December of the same year. In 1848, Fakeerchund transferred the above property to his wife, the plaintiff. The property was afterwards sold, in satisfaction of a decree, as the property of Fakeerchund, and purchased by the defendants in this action. Mussumat Brija has now brought suit to obtain possession of the property in virtue of the alienation in her favor by her husband.

The Moonsiff decided for the plaintiff. The Principal Sudder Ameen held, in appeal, that the property must be still considered

liable to sale under the attachment in 1844, notwithstanding that the case was afterwards struck off, and has urged this as a main reason for reversing the judgment of the Moonsiff, and for dismissing the plaintiff's claim.

A special appeal was admitted to try, whether the Principal Sudder Ameen was right in dismissing the plaintiff's claim on the ground that the property in dispute was not, at the time of its alienation, alienable.

The Court remark that the Principal Sudder Ameen is plainly in error in ruling that any lawful bar to the transfer by Fakerechund to the plaintiff in 1848 was created by the attachment of the property and order of sale in 1844, after that attachment had been taken off, the sale formally stayed, and the case struck off the file. The important plea in defence, that the transaction between the husband and wife, in 1848, was fraudulent, has been very lightly touched upon by the Principal Sudder Ameen, the whole weight of his judgment being made to rest on the untenable position above recited. He writes that the transfer wears the appearance of fraud, but he does not distinctly find the facts. If he found it, he would of course be fully justified in dismissing the suit on that plea alone.

The suit is sent back to the Principal Sudder Ameen in order that he retry it with reference to these remarks.

The 16th September, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 112 OF 1851. { *Special appeal from the decision of*
 Mohumed Hoossein Khan, Principal
 Sudder Ameen of Barcilly, dated
 21st February 1851.

BICKRUM SINGH AND OTHERS, (*Defendants*), *Appellants,*
 versus

JOWAHIR SINGH, (*Plaintiff*), *Respondent.*

THE particulars of this case are to be found in the volume of printed decisions of the Sudder Dewanny Adawlut for December 1850, page 449. The suit, for the reasons therein recorded, was remanded for retrial to the Principal Sudder Ameen on the 28th December 1850.

The case has again come before the Court in special appeal. A special appeal has been admitted to try, whether the Principal Sudder Ameen is not in error in supposing that the decree of

the Court of first instance must necessarily be upheld, because the Sudder Dewanny Adawlut reversed his (the Principal Sudder Ameen's) decision, and remanded the suit.

The Court observe that the points, which the Principal Sudder Ameen was bound to try, are most clearly laid down in the Court's judgment of the 28th December. The present decision of the Principal Sudder Ameen is vaguely worded, but so far as the Court can fix its meaning, they understand the Principal Sudder Ameen to rule, that the grounds of his judgment not having been considered by the Sudder Court to be tenable, nothing remains but to fall back upon the grounds of judgment assigned by the Court of first instance, and to decide accordingly. This mode of proceeding does not meet the requisition of the Court; if it did, the remand was superfluous, and the Court might have disposed of the case themselves when it was last before them. It is necessary that the Principal Sudder Ameen should exercise his independent judgment on the points set down for trial, and record a finding upon them.

The Court are therefore constrained to remand the suit a second time to the file of the Principal Sudder Ameen.

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The 16th September, 1851.

Present : { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 113 OF 1851. { *Special appeal from the decision of*
 Mohumed Hoossein Khan, Principal
 Sudder Ameen of Bareilly, dated 21st
 February 1851.

BICKRUM SINGH AND OTHERS, (*Plaintiffs*), *Appellants,*
versus

JOWAHIR SINGH, (*Defendant*), *Respondent.*

THIS suit is remanded a second time to the file of the Principal Sudder Ameen for the reasons stated in the Court's judgment in case No. 112 of this date.

The 18th September, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 133 OF 1849.

{ Regular appeal from the decision of
Syed Tussuddooq Hoosein Khan,
Principal Sudder Ameen of Azim-
gurrh, dated 1st March 1849.

MUTTRA PANDE AND OTHERS, (Defendants), Appellants,
versus

CHYT PANDE, (Plaintiff), Respondent.

THE plaintiff sued to establish his sole title and right of possession in the *maaffee* village of Autroor, for the recovery of Rs. 2,700, *wasildt*, and for the reversal of certain orders of the revenue Courts specified in the plaint. He founded his claim on the grant of the village to his grandfather by the Rajah of Benares, on the issue in his favor of an arbitration award in a dispute relative to his right in the property, which had been contested by other claimants, and of a suit in the Civil Court instituted to set aside the award, and on continuous possession up to the year 1844, when the defendants' names were first recorded in the proprietary column by order of the revenue authorities.

The defendants, in answer to the suit, maintained that the mouzah had been originally acquired by a common ancestor prior to the rent-free grant, that the circumstance of the grant having been issued in the name of plaintiff's grandfather, singly, was not conclusive against their participation in its benefits, and that they had enjoyed them uninterruptedly jointly with the plaintiff. They further denied that their interests were affected by the issue of the former suits, which had been carried on between plaintiff and other claimants.

The Principal Sudder Ameen entered at some length into the oral and documentary evidence produced by the parties, and, considering the plaintiff's claim established, on the grounds set forth in the decision, he decreed the suit *minus* the *wasildt*.

In appeal, the defendants, appellants, have renewed a plea urged in the lower Court. They plead that the decree is for the proprietary right, whereas the suit was brought merely for the rent-free rights. This objection is without force. There is no evidence to show that the *maaffee* and proprietary right have ever been disjoined, and the object of the plaint and proofs are clearly directed to the recovery of all the rights in the property, which the other party were in possession of. With regard to the merits of the case, I concur in the lower Court's conclusions from the evidence. The only point to be considered in the case is the

proof, which the record affords, of the respondent's sole possession prior to the orders of the revenue Courts in 1844. This has been furnished by the evidence to the grounds of claim detailed in the plaint, which shows that the respondent appeared singly in defence of the *maaffee* right, and was in possession for a series of years prior to 1844, besides making good his sole title in the Civil Courts against all claimants up to that year, and that the appellants' names were recorded by the revenue Courts in 1844 without any preliminary enquiry. The appellants' evidence is of an inconclusive character, and the decision in their favor of a Court of another district in a suit of a parallel nature relating to another mouzah, which has been produced by their vakeel, cannot be allowed to influence the decision in this case, the material point of possession having been overlooked in the decision quoted. The decision is affirmed with costs.

The 20th September, 1851.

Present: { A. W. BEGBIE, } Judges.
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 90 OF 1851. { Special appeal from the decision of W.
 P. Masson, Esq., Officiating Judge of
 Goruckpore, dated 31st January 1851.

KISHUN DUTT, (Defendant), Appellant,

versus

RAMJEEAWUN, (Plaintiff), Respondent.

FOR the particulars of this case see pages 19 and 20 of the printed decisions for zillah Goruckpore, for January last.

A special appeal was admitted to determine "whether the Judge's decision ought not to be reversed, on the ground of its resting on a finding at variance with the plaintiff's own statement of the facts of the case, and as being contradictory in itself, and opposed to the rule contained in the Circular Order of the 13th September 1843, which prescribes, "that Judges shall confine themselves to the adjudication of the point or points at issue between the parties, as set forth by themselves."

The Court remark, that the certificate of special appeal correctly states the defects in the Officiating Judge's decision. The plaintiff rests his claim on the assertion that the bond was executed in his own favor *exclusively*, and without reference to the general interests of the firm of which he had been a partner. This statement is met by the counter-assertion of the defendants, that though the bond was drawn up in plaintiff's name, the

amount was lent by, "and was actually due to the firm," and the Sudder Ameen, being of opinion that the statement of the defendant was the true one, and that the debt had been repaid, dismissed the plaintiff's claim. The Officiating Judge finds, that the debt was owing "to the firm collectively," a supposition directly opposed to the plaintiff's own statement; and finding which, the Officiating Judge should have dismissed the plaintiff's claim, as fraudulent. The Judge goes on to say, "The money was lent by plaintiff; to plaintiff he gave the bond, which was drawn in plaintiff's name; legally speaking defendant knew nothing of the other three, and, unless from plaintiff, until the law declared otherwise, or the person to whom plaintiff might transfer the bond, he could not have a quitance: the receipt from the three is therefore invalid." These remarks are obviously inconsistent with what the Judge has stated previously, as to the debt being due "to the firm, collectively." The concluding part of the Officiating Judge's decree renders his meaning still more obscure. He makes a supposition that the plaintiff acted as "the managing partner for the firm," and that "excepting the landed property, all the property had been divided," and records his opinion, that, under this view of the case, the plaintiff was entitled "to sue for himself on this bond." This version of the case is purely hypothetical, as the plaintiff himself does not make any statement to this effect.

The Court are compelled, with advertence to the foregoing observations, to annul the Officiating Judge's decision, and to remand the case for fresh adjudication.

The 20th September, 1851.

Present: { A. W. BEEBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 195 of 1851. { *Special appeal from the decision of
Moulve Mohamed Lutef Khan, Prin-
cipal Sudder Ameen of Goruckpoor,
dated 29th January 1851.*

DEENDYAL SINGH AND OTHERS, (Defendants), Appellants,
versus

MUMESH DUTT AND OTHERS, (Plaintiffs), Respondents.

THIS was a suit to obtain possession of 28½ beegahs of land valued at Rs. 289; to have the names of the plaintiffs entered in the survey papers, as proprietors; and to amend the Settlement proceedings under date 21st October 1837, and 1st January

1833. Plaintiffs stated that 101 beegahs of land had been given to them to be held free of rent, by the ancestor of defendants, in 1105 Fuslee, and had ever since remained in their possession; but, on an enquiry instituted under the provisions of Regulation IX. of 1833, the *maaffee* tenure had been abolished. The land so resumed had, at the time of survey, been indicated by plaintiffs as their property, and they applied for the settlement to be made with them, which was done on the 26th July, 1837. Subsequently, the defendants, in collusion with the surveying Ameen, contrived to cut off 28½ beegahs from his land, and to get it within their own boundary; and consequently, at the settlement, plaintiffs were allowed to engage for no more than 72½ beegahs. For a long time this fraud of the defendants remained unknown to plaintiffs, and was only discovered when the former attempted to take possession of the 28½ beegahs.

The defendants, in reply, urged, that the land had been included in their village at the measurement of 1244 Fuslee, and that, consequently, the suit was barred by the law of limitation. They averred, that plaintiffs had indicated to the surveying Ameen no more land than they actually possessed, viz. 72½ beegahs, of which, consequently, the settlement had been made with them. Their statement, as to the quantity of land being 101 beegahs, was altogether untrue. The extent of their original rent-free land was only 52 beegahs, to which, at the time of the measurement, they had fraudulently added on 21½ beegahs, and caused this also to be included in the measurement.

The Moonsiff passed a decree in favor of the plaintiffs (with exception of two who had withdrawn from the suit,) but attached to his order the condition, that, until the decreeholders and the two plaintiffs, who had withdrawn from the suit, should agree to a division of the land, made in such a manner as to form two distinct and compact parcels, the decree should not take effect. The Principal Sudder Ameen upheld the Moonsiff's order.

A special appeal was admitted to try, 1st, whether the Principal Sudder Ameen was justified in assuming the dispossession of the plaintiffs from the date of the settlement made with the defendants; 2nd, whether the decree of the Principal Sudder Ameen is not vitiated by the insertion of a condition, which opposes an obstacle to its execution.

The Court are of opinion that the lower Courts are not in error in finding the dispossession of the plaintiffs from the date of the Settlement. It is true that the *khursh* or survey paper, by which the disputed land was included in the defendant's village, was prepared more than twelve years before the institution of the suit, but the Court look upon that document as merely preliminary to the Settlement. The act of recording,

in the survey paper; the land as belonging to the defendant's estate, does not amount to dispossession, which did not take place, till the entries in the *khusrak* were recognized as correct, by the Settlement Officer, and the settlement of the disputed land made with the defendants. On the first ground stated in the certificate, therefore, the Court see no reason to interfere with the decision of the lower Courts. But, as regards the second point noticed in the certificate, there can be no doubt that the decree of the Moonsiff, affirmed by the Principal Sudder Ameen, is irregular, from the introduction into it of the final restrictive clause. The decree is thereby rendered almost to a certainty inoperative, its execution being made dependent on a most improbable contingency. The Court, accordingly, annul the decrees of the Moonsiff and Principal Sudder Ameen, and remand the suit to the Moonsiff, in order that a new decision may be passed, not open to the objection which afforded ground for the present appeal.

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The 20th September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

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CASE No. 205 OF 1851. { *Special appeal from the decision of C.
C. Jackson, Esq., Judge of Meerut,
dated 28th February 1851.*

FUTTEH SINGH, (*Plaintiff*), *Appellant*,
versus

SUDDASOOKH AND OTHERS, (*Defendants*), *Respondents*.

THE decision appealed from is in the printed volume for the month.

A special appeal was admitted, without summoning the respondents, to try, whether the Judge had adjudicated the pleas of the parties: and 2ndly, whether, when the evidence was both documentary and oral, the Judge was not bound to consider and dispose of the reasons in the judgment of the lower Court drawn from both kinds of evidence before reversing its decision.

The Court are of opinion that the judgment is invalidated by the defects noticed in the certificate. The plaintiffs alleged a long proprietary possession of the ground and buildings, which had been disturbed by a late decision of the Criminal Court, under Act IV. of 1840. The two parties, who had been made defendants, separately pleaded, the first, that they held possession as *ryots* of the co-defendants, and the latter, that the ground

and buildings were their own. It is not therefore an adjudication of the point at issue to rest the reason for the dismissal of the claim on the ground that the plaintiff's witnesses had deposed to the plaintiff not having occupied the ground for seventeen years, which is admitted in the plaint, unless the fact of plaintiff's total dispossession from the exercise of any proprietary rights in the thing sued for, for a period beyond the limitation, be also clearly determined. Into the consideration of this point, the question of the original title need not enter.

With regard to the second point in the certificate, the Court, on perusal of the decision of the Moonsiff's Court, find, that, besides the oral evidence adduced by both parties, the documentary evidence has been entered into in much detail, and that a body of reasons and arguments has been adduced therefrom at considerable length in support of the claim, which have not been disposed of by the Judge. The judgment in appeal passed in reversal of the Moonsiff's decision is therefore necessarily imperfect, and is annulled. The Judge is desired to replace the case on his file, and pass a fresh decision in advertence to the foregoing remarks. The stamp will be refunded, as usual.

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The 20th September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

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CASE No. 208 OF 1851. { *Special appeal from the decision of*
 G. Blunt, Esq., Judge of Allypore,
 dated 24th March 1851.

TEEKARAM, (*Plaintiff*), *Appellant*,

versus

CHOONNEE LALL, (*Defendant*), *Respondent.*

THIS suit was brought for the recovery of a balance of accounts in some money transactions between two firms, in which the item of the latest date, or Rs. 1,249, was debited to the defendant in plaintiff's books on the 9th Aghun, 1894 Sumbut, corresponding with the 21st November 1837. The statement in the plaint is, that the balance was borne on the books with interest upto the 30th Kooar, 1896, when payment was demanded, and the debt was duly acknowledged by the defendant. The suit was instituted on the 9th November 1849.

Defendant admitted that business had been carried on between them from 1891 to 1894, but he alleged that it had closed in Bhadon, 1894, corresponding with September 1837, and that the

account had remained unsettled from that period. He denied any acknowledgment of the debt, and pleaded that the transactions and account fell beyond the limitation.

The Principal Sudder Ameen held the acknowledgment to have been proved, but proceeding to test the accounts from the commencement of the year 1894, he disallowed some items, and gave a decree for Rs. 776-13-3, the balance which was found to be due in the last entered item.

In appeal, the Judge recorded his opinion that the suit rested wholly on the fact of the acknowledgment in 1896, and considering it not proved on evidence, he dismissed the suit under the limitation statute.

A special appeal was admitted to determine, whether the reasons for dismissal of the suit were correct.

The Judge has been in error in assuming this acknowledgment as the ground of action. The suit is for the recovery of the balance of an account, which is represented as having remained open between the firms up to the 9th Aghun 1894, and the acknowledgment said to have been made in 1896 is adduced as an additional proof of the claim. The disallowance of this proof, by the Judge, does not disturb the ostensible cause of action, or invalidate the decree of the Principal Sudder Ameen's Court, which is confined to the single item of the account within the limitation, dating it from the 9th November 1837, and the weight that may be due to any conclusions from the evidence to the acknowledgment will be best considered in the decision on the merits. The Court accordingly overrule the reasons for dismissal assigned in the judgment, and remand the case to the Judge. The stamp will be refunded, and the costs charged as usual.



The 22nd September, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 234 OF 1850. { Regular appeal from the decision of
 Ruzee-ood-deen Khan, Principal Sud-
 der Ameen of Allygurh, dated 26th
 August 1850.

GHYBER SINGH AND OTHERS, (Plaintiffs), Appellants,

versus

BHOJRAJ AND OTHERS, (HEIRS OF SOOKRAM AND HEERA SINGH)
 MOTE LALL AND JOWAHIR SINGH, (HEIRS OF MAN SINGH) AND
 BHAGEERUT, KOMANEE AND OTHERS, (Defendants),
 Respondents.

(The last class of defendants, proprietors of a 3 biswah 15 bis-
 wanseer share in the mouzah, are impleaded merely *pro forma*.)

CLAIM, to be put in possession of 16 biswahs 5 biswansees
 of mouzah Runeal, pergunnah Coel, zillah Allygurh, by eject-
 ing Motee Lall and Jowahir Singh, descendants of Man Singh,
 who was placed in possession of the village in succession to
 Sookram and Heera Singh, the latter having obtained possession
 in virtue of an order passed by the Judge of Allygurh, on 30th
 May 1827; and to recover Rs. 8,820-15-6, surplus proceeds of
 the mouzah, after due satisfaction of two decrees, amounting to
 Rs. 5,321-18-5. Full value of claim Rs. 11,795-10-5.

The plaint sets forth that Ghyber Singh and others are enti-
 tled, as of hereditary right, to 16 biswahs 5 biswansees in mouzah
 Runeal. In 1827, two decrees were put in force against the an-
 cestors of the plaintiffs, one had by Sookram and Heera Singh,
 (ancestors of Bhojraj and others) for Rs. 3,132-6-2; and another
 had by Moteeram, Luchmun Singh, and Chuttur Singh for
 Rs. 2,189-7-3. Sookram and Heera Singh agreed to pay the
 amount of the decree held by Moteeram and others, and prayed
 to be put in possession, till satisfaction of the two decrees, of the
 whole mouzah, all of it being at the time the property of the
 plaintiffs. The Judge, by an order dated 30th May 1827, sanc-
 tioned this arrangement, and possession was made over to
 Sookram and Heera Singh, on the understanding and condition
 that the property should be re-delivered to the owners, whenever
 the amount of the decrees should have been made good from the
 proceeds. Man Singh, having unsatisfied claims against Sookram
 and Heera Singh, succeeded, on 10th March 1836, to possession
 of the mouzah under an assignment by Sookram and Heera

Singh, that is it to say, Mân Singh accepted, in satisfaction of the debt due to him by Sookram and Heera Singh, the lien on the property, which the latter held. Subsequently, Bhageerut and others claimed a 3-biswah 15-biewansce share, got a decree for it, obtained possession, and drew proportional profits. The plaintiffs aver that they have frequently solicited a settlement of accounts, but those in possession have found their occupancy of the estate too profitable to be relinquished: at length, however, on consulting the *nikasees*, the plaintiffs have clearly ascertained that, after satisfying the decrees, a surplus balance exists in their favor, amounting to Rs. 8,820-15-6, wherefore they claim possession of the property and payment of the aforesaid sum.

The descendants of Sookram and Heera Singh reply, that a large balance, on account of interest only, was due to Sookram and Heera Singh, when possession was transferred to Mân Singh, and is due to this day. The village was made over to Mân Singh in 1244 Fuslee, and the plaintiffs are not in a condition to sue for re-establishment in possession till both principal and interest of their debt are paid. The plaintiffs have passed by without notice the very important order by the Judge dated 19th June 1827, which is subsidiary to his former order of the 30th May, and which distinctly provides for payment of interest as well as of principal. An account is tendered by these defendants, showing that a balance of Rs. 3,984-4 is still claimable from the plaintiffs, on account of interest, exclusive of the unpaid principal.

It is replied by Motee Lall and Jowahir Singh, representatives of Mân Singh, that in no single year was there a sufficient sum realized from the mouzah to meet even the demand of interest, to say nothing of the principal, and that nearly Rs. 3,500 are due to them in the shape of interest, besides the interest claimable by the heirs of Sookram and Heera Singh. The Judge, on the 30th May 1827, gave his countenance to the arrangement above described, assigning three reasons for so doing; 1stly, the decree of Moteeram and others would be satisfied; 2ndly, the decree of Sookram and Heera Singh would be satisfied; and 3rdly, Sookram and Heera Singh were formerly securities for the zemindars, and would pay the revenue with punctuality, so that the revenue department would also be satisfied. After that, on the 19th June 1827, a supplementary order was made by the Judge, directing that the zemindars be charged with interest on the amount of the decrees against them. Sookram and Heera Singh held possession from 1234 to 1243 Fuslee, and to them succeeded, in the last named year, Mân Singh. Whatever small profits have been drawn from the estate have been placed to the account of interest; an allowance

was made to the plaintiff of Rs. 100 per annum from 1244 to 1247, and of Rs. 50 per annum afterwards, on the recognition by the Court of the right of Bhageerut and others to a 3-biswah 15-biswansee share. These defendants are at a loss to comprehend why the plaintiffs should institute the action.

The Principal Sudder Ameen observed that no dispute exists as to the fact of successive possession by the two first classes of defendants. It is shown that the Judge ordered possession by the decreeholders on 30th May 1827, and shortly after, that is, on 19th June 1827, directed that the plaintiffs before re-admission make good interest on their debt as well as the principal thereof. The plaintiffs allege indeed that they knew nothing of this second *roobakaree*, but it is conclusive as to interest nevertheless, and the charge is strictly equitable. Is then the transaction to be regarded as a mortgage? If so, all that remains is to adjust the accounts. The Principal Sudder Ameen held that the property was pledged just as property is pledged for the amount of a bond, and the Judge having, according to the practice which prevailed in those days, placed the defendants in possession, the case must be dealt with precisely as one of mortgage. The correctness of the *nikasees* is not disputed; these give an amount of receipts, from 1827 to the present time, of Rs. 36,687-9-3, of which Rs. 24,000 have been paid as Government revenue, and Rs. 2,003-13-9 have been set apart to defray village expences. The lower Court refused to credit the defendants with the amount they professed to have paid by way of allowance to the plaintiffs, or to give them any thing for *huq tehseel*, and having adjusted the accounts on the principle of calculation, which is applicable to cases of mortgage, decided that Rs. 4,260-12-9, were still due as interest only, exclusive of principal. The suit was therefore dismissed.

It is contended by the appellant that the rules which bear on mortgage cases cannot be made to extend to the case of property made over to a creditor for the more effectual recovery of a debt. The Judge made over the village in 1827, without the consent of the appellants, and ordered that the amount of the two decrees should be made good from the profits, after deduction of *malgoosaree* payments and village expences, and it was further ordered that copies of the order be given to both parties, that all disputes be finally set at rest. This then was no mortgage, for it is not competent to a Judge to mortgage a man's estate without the owner's consent; in mortgage cases a transfer takes place in the Collector's books, and no transfer took place here. The *roobakarees* drawn up on the occasion of placing Sookram and Heera Singh in possession do not speak of any mortgage. In the execution of a decree, such a thing has never been heard of as the

deduction, every year, of the interest in the first place, the balances, if any, being carried to credit of the principal, and if to a case like the present, the rules which govern mortgages are applied, the satisfaction of a decree will be a matter of exceeding difficulty. The appellants urged on the 21st March 1836, that the decrees had been satisfied, and they objected to the possession by Mán Singh, and on 4th September 1841, the case of the execution of the decrees of Sookram and Heera Singh was struck off; if this be really a mortgage, how were orders such as the above passed in the miscellaneous department? If the Settlement proceeding of 18th January 1838 be referred to, it will be evident that the decreeholders were not in possession as mortgagees, and that the Settlement Officer protested against the notion that the transaction was a mortgage transaction. The judgment of the Principal Sudder Ameen is not consistent with itself: at first he did not regard the case as one of mortgage, and afterwards he passed an order at variance with his preliminary *roobakaree* fixing the issues under Section 10, Regulation XXVI. of 1814; and, on 14th August 1850, he desired the defendants to put in the usual accounts and to swear to the truth of them. The *roobakaree* of the 19th June is opposed to that of 30th May. In the first there is no provision made for the payment of interest, it is not even alluded to, and must assuredly, if any new order were to be passed, the other side should have been summoned; in their absence, in the absence of even a notice to them to attend, the order of the 19th June cannot be a valid order. The present award of interest is made in the very face of the original decrees, which disallowed interest. Even if the *roobakaree* of 19th June be regarded as valid, (and the appellants contend that it cannot be so regarded) still the interest cannot be awarded on the principle followed by the Principal Sudder Ameen, that is, on the principle of deducting every year the interest from the main debt; and of carrying the balances, if any, to the liquidation of the main debt; for what does that *roobakaree* of 19th June empower? Simply this, interest is to be charged to the zemindars, the proceeds of the estate having been *first* carried to account in payment of principal. The Judge made over the property to help the satisfaction of the decrees, but not to ruin the appellants. If the interpretation put on the Judge's *roobakaree* by the Principal Sudder Ameen be a right one, the release of the village, the then *nikasees* and *jumma* being taken into consideration, was an utterly hopeless matter. The appellants urge, in conclusion, that they have been wrongly charged with the costs of the fees of three vakeels, whereas the costs of the fees of only one vakeel should have been charged.

Motee Hall and Jowahir Singh put in a reply to the appeal. They contend that the order complained of was made at the ex-

press desire of the appellants, that it was issued twenty-two years ago, and never called in question. To give a property to another as security for a debt and to mortgage it, are one and the same thing, and it is a mere dispute about words to call the transaction in this instance any thing else than a mortgage. The appellants cannot point to any similar case in which a judgment, different from that now come to, has been passed. The respondents submit that Construction 868 may be acted upon with propriety, and that ten per cent. on account of *hag tehseel*, which the lower Court has disallowed, ought to be awarded to them. The appellants could not have been ignorant of the order of 19th June 1827, seeing that no public officer ever does what affects the interest of any without making an intimation to him. The order of 19th June is *not* opposed to that of the 30th May, if indeed the former order had ruled that no interest should be charged; and the latter had ruled that interest should be charged, there would have been an obvious contradiction; not so at all, when that which is omitted in an earlier order is supplied by a later. The appellants have not drawn the due distinction between an order, which is contrary to another, and an order which is merely not conformable to another. Be the order, however, good or bad, it cannot be interfered with after the lapse of more than twelve years. The Judge acted on the principle of the Circular Order of 11th January 1839, which has been declared by precedents of this Court to have a retrospective operation. The Judge acted for the benefit of the appellants; he took care of their property for them, and they ought to feel grateful for his care.

The Court are of opinion that the rules which govern cases of formal mortgage cannot with propriety be referred to in disposing of the case before them, the incidents of which are altogether peculiar. It is not as if the appellants had voluntarily taken up a sum of money from the respondents, pledging their property for the payment, and placing their creditors in possession, with a stipulation, as is frequent in cases of mortgage, that profits should be taken in lieu of interest; and yet the lower Court has dealt with the case as if the subject presented itself in this very ordinary shape. On the present occasion, the original decreeholders did not seek to avail themselves of that process of the law against the property of their debtors, which immediately suggested itself; they applied to be put in possession of their estate with a view to the recovery, from the proceeds of it, of the amount of the decrees: to this they were no doubt moved much less by any considerations of lenity towards their debtors, than by considerations of what was advantageous for themselves, and the Judge, it may be presumed, was influenced by desire to get rid of the case by effecting

a settlement of the claims in an equitable manner. Accordingly, on the 30th May 1827, he acceded to the application of Sookram and Heera Singh, and placed them in possession, to be yielded up to the proprietors whenever the amount of the decrees should be made good from the proceeds of the estate. It is evident to the Court, whatever may be said to the contrary by the appellants, that this arrangement had their full concurrence, that it was readily accepted by them as a beneficial measure; it is equally clear from the spirit of the order passed, and indeed from its letter, that no charge of interest was contemplated by either party, or by the Judge, and that the latter regarded the adjustment as final, subject only to the payment of the gross debt from the profits. He expressly ordered that copies of his proceeding be given to both parties to prevent any further dispute and that the papers of the case be "*dakhil dufstur*;" a proceeding such as this bears no affinity to a mortgage. It is quite true that, on the 19th June following, the Judge, at the instance of the decreeholders, re-addressed himself to the subject, and ordered that interest be charged in addition to the principal; but when the Court look to the entire failure of the Judge to satisfy himself that on this occasion his order was founded in justice, to his failure to refer to the original decrees, so as to assure himself that he did not contravene any stipulations therein, to invite any objections which might fairly be urged by those against whom his order was directed, to his failure, in short, to assign any better reason for making his order than that it was made, because it was asked for, they are unable to recognize the validity of this second *roo-bakaree*. It is therefore left to the Court to guide their decision by principles of equity with reference, generally, to the rules which govern the execution of decrees for the payment of money. In neither of the original decrees is future interest provided for;

but the Courts are empowered* "to exercise a sound and equitable discretion" in awarding interest and in determining the rate at which it shall be awarded, not of course exceeding 12 per cent. per annum, in cases in which "no specific stipulation may exist." The Court believe that they shall act up to the intent of the above Circular Order, and shall deal out substantial justice between the parties, if they adjudge the appellants to be restored to possession of their share in the mouzah on payment of simple interest at the rate of 6 per cent. per annum, on the amount of the original decrees. They pass a decree to that effect, disallowing the claim of the defendants to *huq tehseel*, as well as their claim to any deduction on account of *malikana* to the plaintiffs, of the payment of which, though certain papers are filed with the record, which purport to be

* Circular Order, 5th May 1837, Para. 3.

receipts for *malikana* by the plaintiffs, no legal proof whatever has been adduced, the authenticity of these receipts not having been established by oral testimony. The *nikasee* papers show that, on the principle of calculation above laid down, the plaintiffs are in a situation to claim possession with *wasildt* from date of institution of suit to date of recovery of possession, and, further, to demand payment in money of Rs. 2,222-11-3, on account of surplus profits drawn by the heirs of Mân Singh, by whom the above amount is hereby declared payable, with interest at the usual rate, till final realization of the decree. Order is made accordingly in reversal of the judgment of the Principal Sudder Ameen.

The 22nd September, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, *Offg. Judge.*

CASE NO. 163 OF 1851. { *Special appeal from the decision of J. P. Gubbins, Esq., Judge of Dehlie, dated 22nd April 1851.*

BULDEO SAHOY, (*Plaintiff*), *Appellant*,

versus

MUSSUMAT KURREEMUN AND OTHERS, (*Defendants*), *Respondents.*

THE volume of the printed decisions for April 1851 supplies the history of this case.

A special appeal was admitted to try, whether the Judge has or has not confined his decision to the points at issue between the parties.

The Court find that the Judge has decided this suit on grounds of expediency rather than of right. He has merged the functions of the Judge in those of the arbitrator. The simple question was, whether the newly opened window "looking right into the door of the plaintiff's upper rooms" constituted a nuisance, and whether, consequently, the plaintiff could claim its removal by an order of the Civil Court. On the decision of this point in the plaintiff's favor or otherwise, according to the evidence adduced, must it depend whether the window be closed up, or suffered to remain as it is. To order "that it be moved a little to the right side" is to come to a decision foreign to the issue tendered.

The Court reverse the decision of the Judge, and remand the suit to him that he retry it with reference to these remarks.

The 22nd September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DRANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 165 OF 1851. { *Special appeal from the decision of*
 G. Blunt, Esq., Judge of Allypore,
 dated 21st May 1851.

BINDRABUN, (*Defendant*), *Appellant*,

versus

MOORLEEDHUR AND OTHERS, (*Plaintiffs*), *Respondents.*

SEE the printed decisions of the Zillah Courts for the particulars of this case.

A special appeal was granted to try, whether the Judge has rightly understood the principle which it was intended to lay down by the precedent dated 23rd September 1850, Gowal Dass, defendant, appellant, *versus* Sooraj Pershad, plaintiff, respondent.

The decree of the Judge having been made principally to rest on a point other than that raised by the certificate, the Court are not called on to interfere with the particular decision. But, with reference to the Judge's remarks, "the plea that the full amount of purchase money has not been received, even if established, would not invalidate the deed, *vide* Sudder Dewanny Adawlut's decision, 23rd September 1850," the Court are led to believe that the Judge would make too strict an application to the commercial usage of this country of a principle of English Law referred to in the above precedent. The Court did not intend to rule by that judgment that it is not a matter for enquiry whether the full purchase money has been paid or not, and that a plaintiff must necessarily obtain a decree for possession of the thing sold even on irresistible demonstration that complete payment has not been made, provided only that the genuineness of the deed be established. It is expressly declared in the precedent that "deeds may in some cases be avoided by objections relating to the consideration on which they are founded, or to the want of consideration, but generally speaking, the delivery of the deed evidences the completeness of the transaction." A power of enquiry into the fact of complete payment or not, according as it may be occasion to make it, and of conforming their decision to the result of that enquiry, is vested in the Courts in all cases. The passage extracted from the writings of a jurist "held in estimation by English Lawyers," may, the Court apprehend, have had the effect of misleading the Judge to some slight extent. That passage was not set forth as containing a fixed and absolute rule for adoption by the judicial tribunals of this country, but

as indicative of a principle which has been recognized as sound by the law of England, and which is sufficiently broad to allow of its occasional adaptation, with due advertence to the circumstances of each case, to the judicial system of British India.

The Court dismiss the appeal.

The 22nd September, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 182 OF 1851. { *Special appeal from the decision of
Kureem-oollah Khan, Principal Sud-
der Ameen of Agra, dated 25th March
1851.*

NUNNOO, (*Plaintiff*), *Appellant*,
versus

FUTTEH SINGH, (*Defendant*), *Respondent*.

THE plaintiff sued Jowree, brother of the defendant, Futteh Singh, on a bond, and, on 5th April 1847, obtained a decree. In execution thereof, certain land was pointed out as that of the party cast; but the sale was stayed on the *oozurdaree* of Futteh Singh, who, it appeared, held jointly with his brother Jowree, the whole of the land against half of which the process of sale was aimed. The plaintiff then brought a suit to prove that the land marked out for sale was the share of Jowree. He obtained a decree, which was upheld in appeal. In execution, he purchased the share himself on the 1st March 1849. He, however, failed to obtain possession, hence the present action against Futteh Singh, in which possession of the share is not alone contended for, but also the recognition by the Court of the plaintiff's title to remove certain buildings.

The Moonsiff passed a decree in the plaintiff's favor to the full extent sought.

The Principal Sudder Ameen nonsuited the plaintiff.

A special appeal was granted to try, whether the decision of the Principal Sudder Ameen is passed in conformity to judicial usage.

The Court hold that judicial usage does not bear out the decree of the Principal Sudder Ameen. There existed no necessity for an order of nonsuit. The Court find, from the Principal Sudder Ameen's decision, that he does not deny the right of the plaintiff to possession of the share of land sued for, only rejects

his claim to remove the buildings. Under this view, it was quite open to the Principal Sudder Ameen to modify the judgment of the Court of first instance.

As it appears from the plan of the ground filed with the record, and the statements of the vakeels of the parties, that possession may be had by the plaintiff of the share of the land to which he has been adjudged entitled as representing Jowree, without detriment to, or interference with, any of the buildings which may have been erected on the land, the Court decree such possession to him, in annulment of the judgment of the Principal Sudder Ameen. The costs of suit will be borne by the parties in equal proportions.

The 24th November, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 188 OF 1850. { Regular appeal from the decision of Qazie
Yar Ali Khan, Principal Sudder Ameen
of Jounpore, dated 23rd May 1850.

BABOO HURPERSHAD SINGH, (*Plaintiff*), *Appellant*,

versus

PREMSOOKH *alias* KUKOO SINGH, (FOR HIMSELF AND AS GUARDIAN OF RAMSUBUN SINGH, A MINOR, SON OF MUSSUMAT GOPAL, *deyee*, DECEASED), MUSSUMAT PEM KOONWUR, (FOR HERSELF AND AS GUARDIAN OF DEVEEPERSHAD, A MINOR, SON OF BUSSUNT SINGH, DECEASED, (*Defendants*), *Respondents*.

THIS is a suit to recover Rs. 9,655-11, being the amount of a decree, with interest, costs, &c., obtained by the plaintiff against the defendant Premsookh, by the sale of the entire mouzah of Koroopore Chumurha Cheetapore, *puttee* Pursoopore and Khurgoopore, and half of mouzah Hingoollee, and five and half dwelling houses, situate in the city of Benares, and to annul a deed of sale for the above property, executed in favor of the deceased defendant, Mussumat Gopal, *deyee*, by the defendant Premsookh. Plaintiff states that the village of Nurinipore had been mortgaged by him to Deya Singh, of whom the defendants are the representatives. Plaintiff sued for the redemption of the mortgage and obtained a decree, with Rs. 5,195-4, *wasildt*, on the 4th August 1845. On execution being taken out by plaintiff, the defendant, Premsookh, made arrangements for the alienation of the property above specified, with the view of evading execution of the decree. Plaintiff applied to the Court for an order of attachment, but before this was obtained, the case of execution of decree was struck off the file. The decision of the Zillah Court, in favor of plaintiff, was confirmed in appeal by the Sudder Dewanny on the 28th November 1846, and, on the 2nd December 1846, Premsookh executed the *byenamah* in favor of his sister, Mussumat Gopal, *deyee*, which it is the object of the present suit to annul, and the usual mutation of names in the Collector's register was effected without the plaintiff's knowledge. On the 2nd April 1848, plaintiff renewed his application for the execution of his decree, and demanded the sale, by auction, of mouzah Karoopore, on which Mussumat Gopal, *deyee*, appeared as objector under her deed of private sale. On the 30th June 1849, the Principal Sudder Ameen admitted the objection, and dismissed plaintiff's application for the sale of

the mouzah. This transfer to Mussumat Gopal, *deyee*, the plaintiff affirms to be fictitious and collusive, she being in indigent circumstances, and altogether dependent on her brother, Premsookh, whose actual possession remains undisturbed by the nominal transfer.

The deceased defendant, Mussumat Gopal, *deyee*, in reply, after making some objections of a technical nature, which it is unnecessary to advert to, stated, that as the property in question had not been attached under the provisions of Regulation II. of 1806, the defendant, Premsookh, was at liberty to alienate it, and had done so in her favor; that, moreover, she had a previous lien on it, in the shape of a mortgage. She denied her alleged indigence, and declared that she was the actual possessor of the property; and positively repudiated the imputation of fraud and collusion cast on the transaction by the plaintiff.

The defendant, Premsookh, also denied that there was any fraud in the transfer to Mussumat Gopal, *deyee*. The defendant, Mussumat Pem Koonwur, disavowed all interest in the matter in dispute.

The Principal Sudder Ameen dismissed the suit, on the following grounds. He observed that the point for consideration was, whether the transfer of the property made by the defendant, Premsookh, to the defendant, Mussumat Gopal, *deyee*, was collusive and fraudulent or not? It appeared to him that no such fraud or collusion was established: the plaintiff had produced no satisfactory evidence to make good this assertion: he had failed to prove in the original case the alleged intention of the defendant, Premsookh, to alienate the property: the copy of the *roobakaree* of the Principal Sudder Ameen under date 30th June 1849, in the Miscellaneous Department, did not benefit plaintiff. The Principal Sudder Ameen expressed his dissatisfaction with the evidence adduced by plaintiff to prove the indigence of Mussumat Gopal, *deyee*, and the continued possession of the property by the defendant, Premsookh. On the other hand, the possession of Mussumat Gopal, *deyee*, was proved by the copies of revenue vouchers filed by her. He attached no weight to the copy of petition of Premsookh and Pem Koonwur filed by the plaintiff. He discredited the evidence of plaintiff's witnesses, who deposed to Premsookh having admitted to them the collusive nature of the transfer. The mere fact of Mussumat Gopal, *deyee*, being the sister of the defendant, Premsookh, was not sufficient to establish the allegation of fraud: as no attachment under Regulation II. of 1806 had taken place, the defendant, Premsookh, was at liberty, according to Construction No. 588, to alienate his property, and the transfer thus made by him, to Mussumat Gopal, *deyee*, was not liable to be annulled.

From this decision the plaintiff appealed. The defendant, Mussumat Gopal, *deyee*, alone appeared to defend the appeal, but before the case was brought to a hearing, she died, leaving a son (an infant). Additional notices were issued for the appearance of her representatives, but none coming forward, the case was this day heard *ex parte*.

The Court are unanimous in disapproving of the decision of the Principal Sudder Ameen. They are fully satisfied, in opposition to the opinion expressed by him, that the transfer of the property to Mussumat Gopal, *deyee* was nominal, collusive, and fraudulent, the object being to place the property beyond the reach of the Civil Court in execution of the decree obtained by the plaintiff against the defendant, Premsookh. The near relationship of the male and female defendants, the improbability of such a transfer being made, *bona fide*, on account of liabilities to the deceased husband of Mussumat Gopal, *deyee*, fifteen or sixteen years after the decease of that person, the non-production of the alleged pre-existing mortgage, referred to in the deed of sale, in any Court or at any period, either past or present, the non-enforcement of the usual process of *dakhil kharij*, or mutation of names, in the *malgozaree* Register, on the occurrence of the mortgage, the fact of the deed of sale to Mussumat Gopal, *deyee*, being dated *only four days* subsequent to the decree obtained by plaintiff against her brother, the confirmation, by the event, of the plaintiff's expressed apprehension, during the pendency of the suit, as to the transfer, are all indicative of the collusive nature of the transaction. The reasoning of the Principal Sudder Ameen, in support of the contrary opinion, is weak in the extreme. He would seem to be of opinion that the mere fact of a prohibitory order not having been issued by the Court is sufficient to give validity to transfers made by defendants of their property. Such, however, is not the intent of Construction No. 588, which contemplates that the transfers shall be *bona fide*, and not obnoxious to the suspicion of fraud or collusion. Such cases there perhaps may be; but the present does certainly not come within that category. It would be difficult, if not impossible, in most cases, to obtain *direct* evidence of fraud; *presumptive* evidence must ordinarily be sought for, and stronger presumptive proof of fraud than is apparent in the present case could not well be had. The Court see no reason to doubt the correctness of the opinion delivered by the Principal Sudder Ameen in his *roobakaree*, dated 30th June 1849, wherein he says "*it is quite clear* that the defendant (Premsookh) has made this transfer to his sister with the view of protecting his property from the decree-holder." As to the *kereianamahs*, *dakhilas*, &c. filed by the defendants, the Court attach no weight to them, as they were evidently

procured to give a color of reality to a transfer, which is palpably unreal and collusive.

For the above reasons, the Court reverse the decision of the Principal Sudder Ameen, and pass a decree in favor of the plaintiff's claim.

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The 26th November, 1851.

Present: A. W. BEGGIE, Judge.

Case No. 229 of 1851. { *Special appeal from the decision of
R. J. Tayler, Esq., Judge of Joun-
pore, dated 10th February 1851.*

LUCHMUN DASS, (*Defendant*), *Appellant*,
versus

RUGBUNS SUHAI AND OTHERS, (*Plaintiffs*), *Respondents*.

THE particulars of this case are to be found at pages 13 and 14 of the printed decisions for Zillah Jounpore, for the current year.

A special appeal was admitted "to determine, whether the decisions of the Judge and Principal Sudder Ameen are not imperfect, inasmuch as they have determined the auction sale in execution of the decree obtained by the appellants against Thakoornarain to be improper, without first recording any opinion regarding the validity of the *hibbehnamah* executed by Thakoornarain in favor of Mussumat Ruttun Koonwur, from whom the plaintiffs derive their title by private purchase."

The Court observe, that the decisions of the Zillah Courts are open to the objection stated in the above certificate; neither the Judge or Principal Sudder Ameen has gone fully into the question, as to whether the *hibbehnamah* executed by the defendant, Thakoornarain, in favor of Mussumat Ruttun Koonwur (his wife) was a *bond fide* transfer or a merely fictitious transaction, arranged for the purpose of placing the property of Thakoornarain beyond the reach of his creditors, the appellants. Both the Judge and Principal Sudder Ameen seem to think that *ostensible* possession on the part of an objector to the sale of property advertised for sale, in execution of decrees, is sufficient to bar the sale, and they have overlooked the explanatory Circular Order of this Court, under date 21st May 1847, wherein it is declared that the previous Circular Order of the 10th June 1842 did not "contemplate anything but an actual *bond fide* possession (as far as that could be summarily ascertained) under a title adverse to the right of the debtor, and therefore such a right as would bar execution of the decree obtained; nor was it intended to deprive the Courts of Justice of that discretionary power vested

in them to decide upon the fact according to the evidence adduced, as to whether the claim of the objector rested upon an actual and *bond fide* possession, or involved merely the allegation of a fictitious and fraudulent transaction." The Court further observe, that the question of the *bond fide* nature of the transfer to Mussumat Ruttun Koonwur would have been more perfectly tried in the suit No. 41, brought by the decreeholders and auction purchasers against Mussumat Ruttun Koonwur and the plaintiffs in the present case, to obtain possession under the auction sale.

That suit was instituted on the 21st December 1848, whereas the present *cross-suit* was not instituted till the 2nd June 1849, or nearly six months subsequent, and the Court do not understand on what principle the latter suit was decided *first*, and the decision of the older case made to depend on the result of the more recent one. The proper and obvious order for hearing has been reversed by the Zillah Courts. For the above reasons, the Court are pleased to reverse the decisions of the Judge and Principal Sudder Ameen, and the case is hereby remanded to the latter officer in order that he may pass a fresh decision, having *first* disposed of the *other* suit, No. 41, in which the decisions of the lower Courts have also this day been reversed.

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The 26th November, 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 230 OF 1851. { *Special appeal from the decision of R. J. Tayler, Esq., Judge of Jounpore, dated 10th February, 1851.*

LUCHMUN DASS AND PANDE SUNTOKHRAM, (*Plaintiffs*), *Appellants*,
versus

MUSSUMAT RUTTUN KOONWUR AND OTHERS, (*Defendants*),
Respondents.

THE Judge's report of this case will be found at page 14 of the printed decisions for Zillah Jounpore for the current year.

A special appeal was admitted "with reference to the reasons assigned in my certificate of this date in the cross-suit of Rugbuns Suhai and others, plaintiffs, respondents, *versus* the present petitioners."

With advertence to the reasons assigned in the separate judgment this-day recorded by the Court in the cross-suit of Rugbuns Suhai and others, plaintiffs, respondents, *versus* Luchmun Dass and Pandé Suntokhram, defendants, appellants, I reverse the decision of the Judge and Principal Sudder Ameen, and remand the case to the latter officer to be dealt with in the manner indicated by the judgment referred to.

The 29th November, 1851.

Present : { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE NO. 185 OF 1851. { Special appeal from the decision of G.
F. Harvey, Esq., Judge of Cawnpore,
dated 16th December 1851.

OMÉID AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

THAKDOORPERSHAD AND OTHERS, (*Defendants*), *Respondents*.

The printed volume of the Zillah Decisions gives the history of this case.

A special appeal was allowed to try, "whether the reasons assigned by the Judge for dismissing this suit under the limitation law are sound or not; also, whether the Judge's order in regard to costs is not incorrect."

The Judge has ruled, that as the matter really to be tried is contained in the supplemental plaint, and as the date of filing that plaint brings the suit under the law of limitations, the suit cannot be heard.

The Court do not concur in this view. The date of institution of the suit is to be counted from the date of the original plaint. If the amended plaint had been found materially to alter the original declaration, there might indeed be a ground for nonsuit, but none whatever for dismissing the suit under the law of limitation. A supplemental plaint can in no case fall within that law.

The Court observe, incidentally, that the Judge is further wrong in stating that he affirms the order of the Court of first instance. That Court nonsuited the plaintiffs, whereas the Judge has dismissed the claim altogether.

The case is sent back to the Judge's file, that he re-try it with advertence to these observations. The order of remand renders it unnecessary for the Court to enter upon the second point, noticed in the certificate of special appeal.



The 29th November, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 S. S. BROWN, *Offg. Judge.*

CASE No. 196 OF 1851. { *Special appeal from the decision of G. Blunt, Esq., Judge of Allypurrh, dated 21st May 1851.*

DOONGUR SINGH, (*Plaintiff*), *Appellant*,
versus

GOLAB AND OTHERS, (*Defendants*), *Respondents.*

THE particulars of this case are to be found in the printed volume of decisions, in the accustomed place.

A special appeal was admitted to try, whether the Judge was right in dismissing the entire claim of the plaintiff as falling under statutory bar; that is to say, whether the plaintiff is not entitled to a decision on the merits in respect to the instalments claimable within twelve years from the date of suit.

The Court find the dismissal of the claim by the Judge, under the limitation law, on the ground that no payments are shown to have been made to the plaintiff in 1837, or more than twelve years prior to the institution of the suit, to be erroneous. In the words of the Judge, "the terms of the bond are, that the amount of it shall be liquidated by instalments extending over twelve years, beginning from 1835;" and the Judge goes on to write that "in the event of failure to pay any one *kist*, the plaintiff would recover the full amount of the bond at once, with interest." By this is evidently meant not that the plaintiff's failure to sue on the occasion of a breach of contract would have the effect of extinguishing his claim; but that the breach of contract would empower him to demand the whole sum at once, if he chose to demand it, without waiting till the instalments might become due. On the Judge's own showing many of the instalments are payable, under the bond, within twelve years, calculated from the date on which the suit has been brought; in respect to those therefore, the plaintiff is entitled to a decision on the merits.

The Court remand the suit for re-trial with reference to the above remarks.



The 29th November, 1851.

Present : { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 162 OF 1850. { Regular appeal from the decision of
 Doobé Jowala Pershad, Additional
 Principal Sudder Ameen of Azim-
 gurnh, dated 5th July 1850.

CLAUDE HAMILTON BROWN, ATTORNEY OF M. SANDES, ADMINIS-
 TRATOR GENERAL, (*Defendant*), *Appellant*,

versus

BYNEE LALL AND RAM LALL, (*Plaintiffs*), *Respondents*.

THIS is a claim to possession, by removal of the attachment under which it is at present held, of the talooqua Buglee Pinjra, pergunnah Mahomedabad, and to recover Rs. 5,486-12-6, collected from the property while under attachment, by reversal of orders of Principal Sudder Ameen of 6th December 1841, of Additional Principal Sudder Ameen of 9th June 1849, of Principal Sudder Ameen of 12th September 1849, of Additional Principal Sudder Ameen of 12th November 1849, and of the Sudder Dewanny Adawlut of 6th December 1849. The full value of the claim is Rs. 7,506-12-6.

The plaint sets forth that John Stonehouse, of the firm of John and George Stonehouse, sold to the plaintiff the talooqua for Rs. 18,000, put them in possession, and proposed to the Collector the usual transfer of names. The plaintiff paid the Government *kist* for November 1841, and obtained receipts from the *tehseeldar*. One Hardie, lately deceased, who had been engaged in a lawsuit with Stonehouse, put in on 6th December 1841, a petition for attachment of the property under Regulation II. of 1806, and the talooqua was attached accordingly notwithstanding that the plaintiffs remonstrated. On the 26th April 1843, Hardie's suit was decreed in his favor, and it was noted, by the Judge deciding it, that as a regular suit by the plaintiffs was then before the Court, a fitting order in regard to the attachment would be passed in due time. The suit to which the plaintiffs refer, as brought by them, was instituted on the 9th May 1842, the defendants being Stonehouse, Holroyd (who had purchased the talooqua at a Sheriff's sale on the Insolvency of Stonehouse) and Fergusson and Co. of Calcutta, who professed to hold a lien on the estate. The claim was dismissed on the 22nd August 1843, on the ground that a suit to set aside a Sheriff's sale would not lie. The judgment was upheld in appeal, but it

was ruled by the Sudder Court, on 23rd July 1846, that a suit might be brought to try the validity of the title, by purchase, of the plaintiffs. Whereupon, the plaintiffs, on the 17th September 1845, brought a suit against Stonehouse, and got a decree against him; the Judge, on the appeal of Holroyd, who intervened, reversed this decision. In special appeal, the Sudder Court set aside the judgment of the Zillah Court, and directed, on 29th December 1847, that the decision of the Principal Sudder Ameen remain in force. The plaintiffs applied to have the attachment taken off, but were informed that their application could not be granted by the Court until they had obtained a decree for possession. After some further litigation, that order was affirmed by the Sudder Dewanny Adawlut on the 6th December 1849. The plaintiffs, having already obtained a decree in recognition of their title by purchase, and having shown that the estate was sold to them by Stonehouse before the attachment in the suit by Hardie, consequently that the alienation by Stonehouse was valid, demanded to be put in possession of the talooqua.

The defendant replies that property held by the Registrar of the Supreme Court cannot be made the subject of litigation in the local Courts; that the talooqua was sold by order of the Supreme Court, and bought by Holroyd, who has not been made a defendant in this case; that Hardie was not, nor is defendant, (representing Hardie), the real owner of the talooqua, and a suit for possession as against them is untenable; that plaintiffs admit that they sued the seller and the auction purchaser, and that their claim was dismissed on 22nd August 1843. It was dismissed because a Sheriff's sale could not be interfered with, and there can be no claim to possession without setting that sale aside. To the plea of plaintiffs, that they had formerly brought a suit to prove the validity of the sale by Stonehouse, the answer is, that that was not a suit of which the object was to try the right of Hardie to attach the auction purchase of Holroyd. The plaintiffs sue on a title by purchase derived from Stonehouse, on the 19th November 1841, but the whole property of Stonehouse was at that time under pledge for a bond judgment in favor of Fergusson and Co., and could not therefore be alienated. The plaintiffs produce no deed of sale, and in truth no sale ever took place. The deed has not been registered, and it was not put forward when Stonehouse applied to the Collector for a transfer of names; the sale price is variously stated at Rs. 8,000, and Rs. 18,000, and it is a fictitious sale merely for the purpose of depriving the heirs of Hardie of their just claims against the talooqua. It was remarked by the Additional Principal Sudder Ameen in his order of 9th June 1849, that no transfer was effected prior to the attachment in Hardie's case. The receipts

for the Government revenue are not made out in the names of the plaintiffs, but in that of Stonehouse, whose dependants the plaintiffs formerly were. The *kyfeent* of the qanoongoe, dated in February 1842, makes it clear that plaintiffs did not obtain possession in virtue of their so called purchase. On the insolvency of Stonehouse, the *gomashia* of plaintiffs was in Calcutta, but plaintiffs did not come forward. Stonehouse himself averred not that the plaintiffs had any claim, but that the estate was under a lien held by Fergusson and Co.

The Principal Sudder Ameen observes, that the objections taken by the defendant, to hearing the claim, cannot be sustained, it having been shown that the Administrator General is made a defendant only as the representative of Hardie, a British subject, and as having charge of his effects. There is no force in the plea that Holroyd has not been made a defendant, the suit being brought to take off the attachment procured by Hardie. The Principal Sudder Ameen remarks, that in the preliminary *roobakaree*, drawn up under Section 10, Regulation XXVI. of 1814, five points were set down for consideration; 1st, was the talooqua sold to plaintiffs, and did plaintiffs get possession before the attachment? 2nd, had the seller at the time of sale the right to sell? 3rd, is the subject matter of this suit included in any previous suit by plaintiffs or not, and is the suit barred by reason of the dismissal of the claim, which plaintiffs brought against Stonehouse, Holroyd and Fergusson and Co. or not? 4th, should the miscellaneous orders sought to be rescinded, be rescinded or not? 5th, are the plaintiffs entitled to the money in deposit collected from the estate, or not? The Principal Sudder Ameen then refers to the decision of Court of 30th July 1846,—to the petition of Stonehouse presented to the Collector, in which the sale is admitted,—to the fact that though the decision in favor of plaintiffs was reversed by the Judge, yet it was upheld, in special appeal, by the Sudder Court,—to the petition of Stonehouse on 22nd March 1842, and the reply of the representative of Hardie on the 4th April 1846, in a suit brought against him by Holroyd,—to the depositions of the witnesses, whose evidence was taken on 4th November 1846,—to the *malgoazaree* receipts of 4th December 1841,—to the testimony of persons who conveyed the Government revenue to the tehseeldar,—to the depositions of other witnesses on the 2nd and 4th August 1843,—to the *intakhab wasil bakce* for 1249 Fuslee,—to the *jumma khurch* for 1249 Fuslee,—and collects, from the above, clear proof that Stonehouse sold the talooqua to the plaintiffs on the 19th November 1841, and that, on the 21st of that month, the plaintiffs obtained possession of it, subsequently to which possession a *suzawul* was appointed in the case of Hardie, under an order of

Court of 11th January 1842. Stonehouse being proprietor on the date of sale, and so recorded, and no order for attachment having been issued up to that time, it was of course competent to Stonehouse to alienate. In the petition of the insolvent to the Supreme Court, on the 17th May 1842, it was stated by Stonehouse, that all his property had been made over to Fergusson and Co., but that statement was incorrect, the talooqua having been sold to the plaintiffs. The defendant has put in a copy of the decree of 22nd August 1843, and also of the amended plaint of the plaintiffs of 25th April 1843, but these documents do not help the defendant's case, inasmuch as, in the suit referred to, the plaintiffs sued to set aside a Sheriff's sale, and though that part of their claim was disallowed, yet the actual sale of the talooqua to the plaintiffs was shown to have taken place; Hardie was not then a defendant, and the suit was not then brought, as it is brought now, to take off the attachment. The *reobakaree* of the Sudder Court, produced by the plaintiffs, makes it evident, that authority was given to try the validity of the sale, and the Sudder Court, in their judgment of 29th December 1847, have laid down, that if the property had been in any way pledged before the Sheriff's sale, that sale could confer no right. As to the miscellaneous orders, these must unquestionably be set aside, the purchase by plaintiffs and their possession having preceded the attachment; and for the same reasons the plaintiffs are fully entitled to claim the money in deposit collected from the talooqua. The lower Court passed a decree in favor of the plaintiffs.

It is pleaded in appeal, that no deed of sale is forthcoming or ever had existence. No application by Stonehouse, either to the Collector or the Courts, was made until after the order for attachment on 6th December 1841; the application for transfer was made on the 18th December, and there is no reason whatever to believe that the transaction, as between the seller and buyer, was so much as talked of before that date. It is plain that up to the period of attachment the talooqua belonged to Stonehouse, and that Stonehouse did no more than pretend to have sold it, and as not until May 1842 was any objection raised by plaintiffs to the attachment by Hardie, this fact proves that there was no previous possession by plaintiffs nor transfer. Had the talooqua been really sold, intimation of that circumstance would have been given some where or other prior to the attachment. Stonehouse alone, not the plaintiffs conjointly with him, made an application for transfer on 18th December 1841. It has been noticed in the Court's judgment that the sale was admitted by the agent of the Registrar, representing Hardie, in a suit brought by Holroyd, but mere allusion to a sale is therein made, and it was by no means intended to be asserted that the sale was a *bond fide* one. With respect to

the receipts for the Government revenue of 4th December 1841, and the evidence of those who say that they took the money, it is to be pointed out that the plaintiffs are not mentioned as those who paid the money, nor were the names of plaintiffs ever recorded in the Collector's or the putwarree's register. On the contrary, the plaintiffs are shown, by the proceeding of the Principal Sudder Ameen of the 9th June 1849, to have not had possession. It is wholly beyond belief that a property, said to have realized Rs.18,000, should have passed from the hands of one person to those of another without a registry of the sale deed, without the existence of even a trace of it. It is not from any documentary evidence that the Principal Sudder Ameen can have come to the conclusion that the plaintiffs were dispossessed, when the attachment, ordered on the 6th December 1841, was carried into effect on 11th January 1842. Further, a *perwannah*, addressed by Stonehouse to his *karindah*, Anunt Lall, dated 28th November 1841, shows unmistakeably, that no transfer had at that time taken place, and that Stonehouse was in full possession. The case of the plaintiffs having been formerly dismissed, in which they sued Holroyd, Stonehouse and Fergusson and Co., it is not capable of revival; to change only the name of a defendant is not to give the suit a title to be heard. The plaintiffs can take nothing by the decree of the Sudder Court of the 29th December 1847; that decree is worthless against a stranger, and the Court only remarked that a decree had against Stonehouse could not affect the auction purchaser. In conclusion, there cannot be held to be proof of sale under a *byenamah* not producible, and the statement on oath by Stonehouse, which is deserving of special consideration, bears out the plea that no sale was effected.

The Court do not recognize the force of any of the objections which have been urged against the hearing of the present claim. The plaintiffs first brought a suit against Stonehouse, Holroyd and Fergusson and Co., which, as the object of it was not legitimate, as the object of it was to annul a Sheriff's sale, was thrown out. They then sued Stonehouse simply; and the decree against Stonehouse, which they obtained in the Court of first instance, necessarily remained in force when the Judge's decision, reversing that decree, was itself set aside by this Court in special appeal, on the ground that the appeal to the Judge by Holroyd, as intervener, was inadmissible. The claim, as between the plaintiffs and Stonehouse, was disposed of, but no claim was or could be disposed of as between the plaintiffs and Hardie. The plaintiffs have now thought fit to bring to the test the value of Hardie's title to possession under the attachment effected by him, by opposing to it their own title to possession under their purchase from Stonehouse, and this they are fully at liberty to do. It is

nothing to say that a decision, if in favor of Hardie, would not be consentaneous to the decision formerly passed in favor of the plaintiffs, as against Stonehouse, for this is no more than must take place whenever the same thing is contested under conflicting titles, by different parties in different suits. The judgments of the Courts are founded on the materials before them, and do not reach interests other than those of the parties before them. As there is no doubt that had Hardie held possession, not in virtue of an attachment, but of an alleged purchase from the proprietor, the Courts would have authority to determine which title by purchase was valid, that set up by the plaintiffs, or that set up by Hardie; so also it is open to them to try, whether a preferable title is conveyed by the attachment or the purchase.

In the opinion of the Court, the right of the defendant, the representative of Hardie, to retain possession under the attachment, is wholly unimpregnable by any sale transaction, which can be pleaded as between the plaintiffs and Stonehouse. There was no registry of any deed of sale, the deed itself is not forthcoming, and is not shown ever to have had existence; the order for attachment was passed on the 6th December 1841, and it was not till after this order that an application was made to the Collector for transfer of names, on the 18th December, by Stonehouse; that application was made not, as is usual, by both parties, who desire the transfer, but by Stonehouse alone; and further, it is shown that though a *suzawul* took possession, by order of the Court directing the attachment, on the 11th January, it was not till May following, that the plaintiffs preferred objections to the attachment. It is true that, as noticed by the Principal Sudder Ameen, the sale to the plaintiffs was admitted by Hardie in a suit brought against him by Holroyd and admitted apparently for the purpose of repelling the claim of Holroyd; but this is not an admission, of which, when it stands alone, advantage can be taken by a plaintiff who utterly fails to establish his claim, to the satisfaction of the Court, by direct proof. In the present case, when the Court look to the proofs offered by the plaintiffs, they find them to be quite insufficient to warrant a decree in their favor. The Court reverse the judgment of the Principal Sudder Ameen, and dismiss the plaintiffs' claim.



The 29th November, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 44 of 1850. { *Regular appeal from the decision of Moul-
vee Mohumed Zuhoor, Principal Sudder
Ameen of Ghazeepore, dated 27th De-
cember 1849.*

GOLAB RAE AND OTHERS, (*Defendants*), *Appellants,*
versus

NADIRA BEEBEE, MOHUMED TUKHE, SIRDAR KHAN AND OTHERS,
(*Plaintiffs*), *Respondents.*

THE suit is brought for possession of 200 beegahs of land, according to the boundaries specified in the plaint, and for the recovery of Rs. 4,400, *wasildt*, from 1244 to 1255 Fuallee: total estimate of suit Rs. 6,400.

The plaintiffs are the proprietors of mouzah Banka, and the defendants are the zemindars of mouzah Rikowlee. The land, which is the subject of the suit, lies between three mouzaha, Banka, Rikowlee and Sehora. It appears from the history of the case, that this land, along with other land, has been contested by the three mouzaha, one with another, at different times, in the form of boundary disputes. The first dispute was between Sehora and Rikowlee, which was brought by Sehora, as plaintiffs, into the Civil Court in 1815; whilst this case was pending, Rikowlee and Banka settled amongst themselves, by arbitration in 1819, a claim, which had been advanced by Banka against Rikowlee for a portion of the land then in litigation between Rikowlee, and Sehora. In 1825, the Sehora people were successful in their long pending suit with Rikowlee, and obtained a decree, the execution of which necessarily brought them into collision with Banka, whose possession was maintained by an order of the Criminal Court. Sehora then brought an action in the Civil Court to set aside the order, and for recovery of possession of the land by virtue of the decree obtained by them in their suit with Rikowlee, and a decree was given in their favor, which was put in execution in 1835.

In the following year, the decree, in the original suit between Sehora and Rikowlee, was reversed in appeal, and the Sehora people withdrew from all further litigation. Execution of the decree, which had been passed by the appeal Court in their favor, was taken out by Rikowlee in 1837, and by the process they were put in possession of the area, inclusive of the portion which Sehora had recovered from Banka in 1835. The present suit has

been brought by the proprietors of Banka to recover as much of this area as had been previously awarded to them in their dispute with the defendants in 1819, and they put forth the decree and its execution in 1837, as the means of their dispossession and cause of action.

The defendants, amongst other reasons, urged the plea of limitation. The Principal Sudder Ameen overruled this plea. He observed that the events of this suit, between the defendants and Sehora, must be excluded from consideration, as they could not affect the rights of three persons not a party to the suit, and that two points in the case were clearly shown; 1st, that from the time of the award up to the year 1836 the land did not at any time revert to the possession of the defendants, and 2ndly, that by the decision of the Criminal Court the fact of the intermediate possession of the plaintiffs was proved: how or when their possession was lost was not clear, but as defendants' claim was based on the issue of their litigation with Sehora in 1836, the dispossession of the plaintiffs by the defendants must have taken place subsequently, and the suit, which had been brought within twelve years from the date of that decision, was consequently in time.

The Court, under the view taken by them of the case, do not think it necessary to enter into the other reasons recorded by the Principal Sudder Ameen on the merits.

There is not any new matter in the pleadings in appeal, with exception of an assertion of the respondents, who urge that the appellants have themselves raised a bar to their plea of limitation by an admission in the pleadings that the suit had been brought within the twelve years from the date of the decision in 1836. The Court do not consider that this meaning can be attached to the appellants' answer to the plaint. They first deny the plaintiffs' possession, and plead the limitation statute on several distinct grounds, and end by observing that the plaintiffs, who had lately acquired their right of suit by purchase of the mouzah, had come forward with it only two days within the twelve years from the decision of 1836: as a reason, it is equally weak and superfluous, but it is certainly no admission of what they had just before denied.

The Court are of opinion that the decision of the lower Court, in regard to the limitation, is wrong. The Principal Sudder Ameen has overlooked the important fact of the possession of the land in dispute, which was intermediately acquired by Sehora under the execution of their decree against Banka. The date of this execution is fixed by respondents' acknowledgment in the pleadings in the year 1835, and there is no trace of any possession having been re-acquired by respondents between that year and the year 1837, when the appellants succeeded, by exe-

cution of their decree against Sehora, to the possession held by the latter over the entire area. The Principal Sudder Ameen appears to have been of opinion that the possession, which was lost by the respondents in 1835, was only lost relatively to Sehora, and that the adverse possession of the appellants would date from the decree of 1836, or from its execution in 1837; but in order to bring the suit within the limitation, it is not sufficient for the respondents to plead the date of possession of the opposite party. The point to be considered in the case is, not the possession of the appellants, but the dispossession of the respondents, and unless the respondents can show that they had themselves held possession of the land at some time within the twelve years from the date of their suit, they have no cause of action against the appellants or any other party. This they have failed to do, and the suit, which was brought on the 29th December 1848, is therefore beyond the limitation. The Court accordingly reverse the decision of the Principal Sudder Ameen, and dismiss the suit with costs.

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The 29th November, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offg. Judge.

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CASE NO. 227 OF 1851. { *Special appeal from the decision of Moul-
vee Mohumed Hussun Khan, Principal
Sudder Ameen of Bareilly, dated 13th
February 1851.*

GIRUND SINGH, (*Defendant*), *Appellant*,
versus

GHUNSAM SINGH, (*Plaintiff*), *Respondent*.

THE suit is for possession and division of a two and half-biswahs share of mouzah Mirzapore Rehta, and for the *malgoozaree* rights in the same.

The mouzah came under Settlement in the year 1835, and, in consequence of the recusance of some of the proprietors and the non-attendance of others, the Settlement was made with the defendant and another, who were also proprietors, to the exclusion of the other sharers. On the occasion of the completion of the record of rights under Section 3, Regulation IX. of 1833, several years afterwards, the *malgoozars* of the Settlement consented to admit the plaintiff to the *malgoozaree* and possession of his share, on condition of his satisfying his quota of an outstanding village debt. The present suit has been brought to

enforce the fulfilment of this agreement, and a decree for possession and division has been given by the lower Courts, who at the same time declared their inability to decree the *malgoozaree*, and referred plaintiff for this part of his claim to the revenue Court.

A special appeal was admitted to try ; " 1st, whether the lower Courts were competent to decree possession and division in this case, and 2nd, whether the plaintiff, not having first discharged his part of the agreement by the payment of the sum stipulated, was in a position to sue."

It has been already ruled in the case of Mookut Singh, *versus* Urjoon Singh, No. 166, 9th September 1850, that the Civil Courts have no jurisdiction in claims for the alteration of the Settlement arrangements, which are consequent on the exercise of the *malgoozaree* right. Possession and division are rights appertaining to those who hold the *malgoozaree*, and cannot be decreed when the *malgoozaree* is held by others under engagements with the Government. It is not in this case, as when possession and division are decreed on establishment of proprietary right. The proprietary right here is not denied, but its exercise is in abeyance, pending the current Settlement, and the Settlement contract being between the *malgoozars* of that engagement and the Government, it is not in the power of the former, of their own accord, to re-admit, or, of the Courts, to decree the re-admission of a third party. In this case, the Courts allow their want of jurisdiction in regard to the *malgoozaree* right, but they very inconsistently decree other rights which necessarily follow on *malgoozaree* possession. Under this view of the case, the second point in the certificate need not be entered upon. The decision is reversed, and the suit dismissed, with costs.

The 29th November, 1851.

Present: { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 226 OF 1851. { *Special appeal from the decision of*
 Moulvee Mohumed Hussun Khan, Prin-
 cipal Sudder Ameen of Bareilly, dated
 13th February 1851.

PURTAP SINGH, (*Defendant*), *Appellant*,

versus

KINUR SINGH, (*Plaintiff*), *Respondent*.

SUIT for the possession and division of a two and a half biswah share of mouzah Mirzapoor Rehta, and for the *malgoozaree* right in the same.

The particulars of this case, and the grounds of reversal of the decrees of the lower Courts are the same with those of the case No. 227, disposed of to-day. The suit is dismissed, with costs.



The 6th December, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 239 OF 1851. { *Special appeal from the decision of Moul-
vee Mohamed Hussun Khan, Principal
Sudder Ameen of Bareilly, dated 5th
April 1851.*

NURAIN AND DOORGA, (*Defendants*), *Appellants*,
versus

MUSSUMAT SONA AND MUSSUMAT SOONDUR, (*Plaintiffs*), *Respondents*.

SUIT, for the recovery of Rs. 119, on an account.

During the progress of this suit in the Court of first instance, a *razeenamah* was filed, which was afterwards denied by the plaintiffs, and the case was carried on to a decision on the merits. The Sudder Ameen, amongst other reasons for dismissing the suit, adduces the untrustworthy character of the evidence, and enters into it in some detail, in support of his conclusion.

In appeal, the Principal Sudder Ameen brings forward several conjectural grounds for differing from the judgment of the Sudder Ameen, and argues, that although the *razeenamah* was declared to be invalid as regards the plaintiffs, its attestation by the defendants, at the time of its being filed, must be viewed as an admission of the justice of the claim, and be held to be of force against them. In consideration of this virtual admission, and of the indications of fraud on the part of the defendants in that transaction, and, also, "of the proof of the claim by the evidence," the judgment is reversed, and a decree is given for the claim.

A special appeal was admitted to try, "whether the Principal Sudder Ameen had acted in conformity with judicial usage in reversing the decision of the lower Court without disposing of the reasons on which that judgment was grounded."

The defect of the judgment in appeal has been stated in the certificate, and necessitates its annulment, and the remand of the case for a revised judgment. It has often been laid down that the decision of a lower Court cannot be set aside without a full consideration of the reasons assigned in it. The Sudder Ameen has stated his reasons for discrediting the evidence, and the Principal Sudder Ameen should have recorded his reasons for believing it. The summary declaration of his opinion is of no weight, without the grounds for it being shown. In re-trying the case, the Principal Sudder Ameen will have an opportunity of considering, whether the reason founded by him on the attest-

ation of the *razeenamah*, which was afterwards rejected, and thrown out of the case be a sound one.

The 8th December, 1851.

Present : { A. W. BEGBIE, } Judges,
 { H. W. DRANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 231 OF 1851. { *Special appeal from the decision of W. J. Masson, Esq., Officiating Judge of Goruckpore, dated 25th April 1851.*

RADHEY, *tewarree*, (*Defendant*), *Appellant*,
versus

BABOO BHURTPERSHAD AND OTHERS, (*Plaintiffs*), *Respondents*.

FOR the Judge's decision in this case see pages 75 to 78 of the printed decisions for *zillah Goruckpore*, for the current year.

A special appeal was admitted "to try whether the plaintiffs' suit to obtain possession of their ancestral estate during their fathers life-time was tenable."

The Court are unanimously of opinion that the suit of the plaintiffs, which is to obtain possession of hereditary property alienated by their fathers, (who are still living, and who are made defendants in the case) cannot be entertained. This has been definitively ruled in the decision of the Calcutta Sudder Court in the case noted in the margin,* and this Court entirely concur in the exposition of the law therein contained. It appears strange that the Officiating Judge should have disallowed the plaintiffs' claim to *wasildi*, for the reasons, assigned by him, and not

* *Rajah Cheitpal Singh, appellant,*

versus
Sheogholam Singh and others,
respondent, 30th August 1848.

have seen that those reasons were equally applicable to the claim for possession. The Court take occasion, at the same time, to remark on the insufficiency of the Judges reasoning in regard to the necessity or otherwise of the alienation made by the defendants, Hunnooman Pershad Mull and Hunwunt Pershad Mull. Very strong and convincing evidence should be adduced by parties seeking to set aside conveyances made by those of whom they are the heirs or representatives, that the alienation was the result not of urgent necessity, but of wanton waste and extravagance. Necessities may arise for such transfers unconnected with *ancestral debt*, which, from the tenor of his remarks, the Officiating Judge would seem to regard as an essential con-

dition. On this point, the Court request the attention of the Officiating Judge to the decision of this Court in the case noted in the margin.*
 * Luchmee Koonwur, appellant,
versus
 Mudaree Lall and Hurdeo Singh, respondent, 16th September 1850.
 With advertence to the foregoing remarks, the Court reverse the decision of the Judge, and nonsuit the respondents, with costs.

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 The 8th December, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } Offy. Judge.

CASE NO. 134 OF 1851. { Special appeal from the decision of J. T. Rivaz, Esq., Judge of Benares, dated 30th January 1851.

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 RAJAH ESHUREE PERSHAD NARAIN SINGH, (*Defendant*), *Appellant*,
versus

CHUNDER SEEHUR BAIS, (*Plaintiff*), *Respondent*.

THE report of this case will be found in pages 1 to 3 of the printed reports for Zillah Benares, for the current year.

A special appeal was admitted "to determine, whether the Principal Sudder Ameen and Judge have rightly decided that Mussumat Sookhmanee and Mussumat Raddheea possessed the right to make the assignment of their cultivation to the plaintiff."

The Court are of opinion that the important question involved in the decision of the Zillah Courts has not received that mature consideration which it demands. The Judge adduces no reason whatever for ruling the point mooted in the certificate of special appeal; he merely records his opinion that "Sookhmanee and Raddheea *clearly* possessed the right to make these assignments." The Principal Sudder Ameen does indeed state his reasons for coming to this conclusion, and they are to the following purport: "That the former cultivator, Rambuksh, (husband of the two females) possessed a right, which he assigned to the plaintiff in satisfaction of a debt due to the latter, which he was justified in doing; *agreeably to the custom of the country*, there being numerous instances of such transfers on record, and that, consequently, plaintiff was entitled to be considered the representative of Rambuksh, until his claim was satisfied, and that it was incumbent on the Rajah to regard him as such." The Court are willing to admit that, if it be

the custom of the country to recognize the validity of such transfers, the decision of the lower Court (assuming the facts of the case as stated by them,) is correct, but they are not satisfied with the investigation made by the Principal Sudder Ameen regarding this point. To establish the fact of *ancient usage*, much stronger data are required than are adduced by the Principal Sudder Ameen. There is no oral evidence to prove the existence of the alleged usage, and the numerous instances of this description of transfer, on which the Principal Sudder Ameen makes his assertion to rest, consist of *three* copies of conveyances procured from the registry books, all of which bear dates *subsequent to that of the present suit*, and which, for ought the Courts know to the contrary, may have been prepared with a view to their being turned to account by the plaintiff in this very suit. The Court observe that a reference to the record of rights, prepared by the Revenue or Settlement Officers, might probably have thrown some light on the subject. If such an important right, as that asserted by the plaintiffs, does really appertain to the hereditary cultivators, it could hardly have failed to be prominently noticed in the record of tenures, prepared in conformity with the provisions of Clause 1, Section 9, Regulation VII. of 1822. From the use of the words, "*heritable or transferrible*," in that enactment, it is clear that the possibility is contemplated of the existence of tenures, which although *heritable*, are not, necessarily, *transferrible*. Construction No. 890, which declared that "the right and interest of a *jotedar* may be sold in satisfaction of a decree," has been declared by the Western Sudder Court's Circular Order, under date 1st January, 1846, not to have force in these provinces: and before the practice declared by the Principal Sudder Ameen to exist can be recognized as obtaining in any part of the country, the most full and satisfactory evidence to the fact must be adduced: the enquiry, which has been made by the lower Courts, is so meagre, that the Court feels itself unable to determine the question of usage, on a review of the papers before them. They accordingly are pleased to annul both decisions of the lower Courts, and to remand the case for further enquiry.

The 8th December, 1851.

Present: { A. W. BEGGIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, } *Offy. Judge.*

CASE No. 235 OF 1851. { *Special appeal from the decision of Moul-
vee Mohamed Hussun Khan, Principal
Sudder Ameen of Bareilly, dated 12th
May 1851.*

DHUNNA SINGH, BALKISHEN AND OTHERS, (*Defendants*), *Appellants*,
versus

BULDEO SINGH AND DOORGA SINGH, (Plaintiffs), Respondents.

THIS action was brought for the recovery of Rs. 216, under award of arbitration, dated the 27th November 1848. A dispute arising between the proprietors of a mouzah, in regard to the distribution of the land and Government demand, it was referred by the revenue authorities to arbitration, under an agreement taken to that effect from the parties, and an award was given, which disposed of the matter in dispute, and at the same time ordered that a certain sum, on account of excess payments of revenue in past years, should be made good by the defendants in this case, to the plaintiffs. The suit is based on this part of the award, and a decree has been given by the Principal Sudder Ameen in reversal of the decision of the Moonsiff.

A special appeal was admitted to try, whether the award was a valid ground of action in regard to a point which had not been referred to the arbitrator's decision.

The Court, on perusal of the arbitration agreement and award, are of opinion that the arbitrator has exceeded his authority in this instance. Arbitrators have no jurisdiction in matters which have not been specifically referred to them, and there is nothing in the agreement that could be construed as conveying a power of arbitration in regard to the rent payments of the period, preceding its execution. The suit not being sustainable on the ground on which it has been brought, the Court dismiss it, in reversal of the decision of the Principal Sudder Ameen, with costs.

The 8th December, 1851.

Present : { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 224 OF 1851. { Special appeal from the decision of
Doobé Jowala Pershad, Officiating
Principal Sudder Ameen of Azim-
gurrh, dated 27th March 1851.

WUZEER ALI AND OTHERS, (*Defendants*), *Appellants*,
versus

SHER ALI, (*Plaintiff*), *Respondent*.

CASE No. 223 OF 1851.

SHER ALI, (*Plaintiff*), *Appellant*,
versus

INAYUT ALI AND OTHERS, (*Defendants*), *Respondents*.

THE plaintiff sues to establish his right to, and to obtain separate possession of, an half-anna share in mouzah Julah-ood-deenpore. The interests, in which he claims a share, comprise six annas out of the sixteen annas, and the defendants are the sharers in possession.

Some of the persons sued did not appear; others filed confessions of judgment, and one, Inayut Ali, denied the claim, and asserted his own right to a $1\frac{1}{2}$ -anna share out of the six annas.

The Moonsiff was of opinion that the property had been acquired by Inayut Ali from the joint funds, and in behalf of all the sharers, whose joint rights had been admitted by Inayut Ali himself at the time of Settlement. The Moonsiff observes, that plaintiff's name had not been recorded as sharer, at that time, but that his possession of some share in the property was to be inferred from the fact of his brother, Tahir's name having been entered amongst the proprietors. The Moonsiff then proceeds to state that the oral and documentary evidence, which plaintiff had adduced, in order to show that his particular share had been fixed at $1\frac{1}{2}$ anna, was wholly untrustworthy, and that there was no proof of the extent of the individual interests held by the several sharers in the property, but as the defendant, Inayut Ali, admitted that the other defendants held $4\frac{1}{2}$ annas, and the latter had filed confessions of judgment, a decree should be given for the claim in the aforesaid $4\frac{1}{2}$ annas. This decision was upheld by the Principal Sudder Ameen.

The defendants, who confessed judgment, and the plaintiff, both appeal from this decision. Certificates were given to try in special, appeal, "whether, in the case of the defendants, the Courts had not erred in proceeding to a decision on the confessions of judgment, filed by certain of the defendants, and thereby virtually deciding a matter in dispute between the defendants," and for the plaintiff, appellant, "whether the point at issue in the case should not have been tried on the merits, as regards the defendant Inayut Ali." The appeals may be disposed of together.

In the matter of the defendants appeal, there is an obvious error in the decisions of the Court. Instead of trying the issue in the suit between the plaintiff and the defendants, the decisions have, in reality, determined Inayut Ali's share to be $1\frac{1}{4}$ annas on his own assertion, and limited the interests of the other defendants to $4\frac{1}{4}$ annas, or, in other words, the Courts have transgressed judicial usage in adjudicating between the defendants. The Courts have been led into a further error in their judgments, and gone beyond the confessions on which their judgments profess to be based. The claim is for $\frac{1}{4}$ anna in 6 annas; and the confessions were filed for so much, and no more; but the decree has been given for $\frac{1}{4}$ anna in $4\frac{1}{4}$ annas, at variance with the claim, and with the confessing defendants' admissions.

In regard to the appeal of the plaintiff, who has thought it necessary to appear, in order to protect his own interests in the event of a remand, the Court observe, that they will be necessarily affected by any modification on a retrial of the judgments as they stand, and that he is therefore entitled to demand a decision of his claim, on the grounds on which it has been brought.

The Court accordingly annul the decisions of the lower Courts, and remand the case to the Moonsiff's Court for retrial. In taking up the case again, the Moonsiff will do well to bear in mind that the existence of the right claimed must be found, not on inference and assumption, but on the proofs, and that to assume that the plaintiff owned certain interests, notwithstanding the denial of the opposite party, and at the same time to declare that these interests were not definable, which the Court understand to be his meaning, is in fact to pass no decision at all.



The 8th December, 1851.

Present : { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 190 OF 1851. { *Special appeal from the decision of J.*
S. Clarke, Esq., Judge of Azimgurh,
dated 18th May 1850.

PHENKOO SINGH AND OTHERS, (*Defendants*), *Appellants,*
versus

MUNDUL SINGH AND OTHERS, (*Plaintiffs*), *Respondents.*

THE particulars of this case are given in the judgment of the Court of the 9th April last. The plaintiffs, who held decrees of Court for the land claimed by them, from which they had been dispossessed, sued to recover possession, and to obtain an order for the amendment of the six-monthly papers, so as to bring them into accordance with their actual holdings, and obtained a decree in both Courts. The arguments advanced in behalf of the appellants, in special appeal, were, that the plaintiffs had passed over the Settlement record itself, which formed the original of the entries in the six monthly papers; that the land claimed was included in the appellant's Settlement, and that the amendment of the six-monthly papers alone would either be practically a nullity, or that its effect would be to leave them charged under their Settlement engagements with the rent of the land after its transfer to the respondents. A special appeal was admitted to try, "whether the suit ought not to have been brought for the amendment of the Settlement record, as well as for the alteration of the six-monthly papers." The Judge, who gave the certificate, had left the Court before the case was brought on for hearing, and the certificate proceeding on the assumption that the Settlement of the land had been made with the appellants so as to require an alteration of the Settlement record before full effect could be given to the transfer under the decree, the Court, according to the view then taken of the facts of the case, ruled, that the objection taken in the certificate did not materially affect the judgment appealed from, and that "a claim to alter papers whose contents are altogether dependent on the Settlement is in reality a claim to alter the Settlement record."

A review of judgment has now been admitted at the instance of the appellants' vakeel on the ground of error. He has urged that the reasoning of the Court proceeds on the fact of the land having been included in the Settlement of the appellants, whereas the lower Courts had found that it had formed part of the *malgoozaree* area of the respondents, and he has pointed to a

part of the Principal Sudder Ameen's judgment where it is said "that although the land appeared to have been measured prior to the Settlement in the defendants' *elaquah*, this measurement had been superseded by the decisions of the Court and the order of the Revenue Office, which had been subsequently issued in conformity with them, and that the other documentary evidence showed that the land had been included in the plaintiffs' Settlement." The vakeel has also shown that this fact, although not explicitly pleaded by the plaintiffs before, was urged by them in their answer to the reasons of appeal in the Judge's Court, and that the Judge, in affirming the decision, must be held to have adopted the finding of the lower Court on all the points, this included. The objection put forth in the application for review has therefore so far been substantiated; but the result will not advantage the appellant. It only forms a still stronger reason than has yet been advanced for setting aside the certificate, and dismissing the appeal.

The Court is bound to take the facts as they find them in the decisions of the lower Courts, and the fact of the Settlement of the land with the plaintiffs, respondents, having been ruled by those Courts, there could be no occasion for the plaintiffs to sue for the amendment of the Settlement record. The only object they could have in their suit in addition to the recovery of possession would be, to bring the six-monthly papers into accordance with their claim, if they were found to be at variance with it, and this they have prosecuted in their present action. There was not therefore any defect in the suit to support the certificate, or to call for a hearing in special appeal. The appeal is dismissed, with costs.

The 13th December, 1851.

Present: H. W. DEANE, Judge.

CASE No. 235 OF 1850. { *Regular appeal from the decision
of C. C. Jackson, Esq., Offg. Judge
of Meerut, dated 6th September 1850.*

MOHUMED KHULEEL, (*Plaintiff*), *Appellant*,
versus

JUMNA DASS AND OTHERS, (*Defendants*), *Respondents*.

THE particulars of this case are set forth in the printed volume of the Zillah Decisions. It is not necessary, therefore, to recite them in this place. The suit was tried by the Judge, because the plaintiff is a vakeel in the Principal Sudder Ameen's Court.

The first point for determination, in disposing of the appeal, is, whether the money was paid by the plaintiff to Jumna Dass at the time of executing the deed of sale, as is contended by the plaintiff, or not. If it was, it will then be necessary to enter upon the objections in defence in regard to the sufficiency of the *mookhteeearnahs*, and the extent of the interest sold. If it was not, these objections are not reached, and the consideration of them is superfluous.

The plaintiff asserts that Rs. 800 were paid to Jumna Dass, at the time of executing the deed, in presence of certain witnesses, and that the deed so executed was verified by certain other witnesses at the Registry Office. The defendant, Jumna Dass, denies the payment of any money.

I am satisfied that Jumna Dass received no money from the plaintiff. It is altogether unlikely that the plaintiff, a pleader in a native judicial Court, and consequently familiar with fraud in every shape, should part with his money to the seller, simply on the execution of a deed of sale, before the deed was registered, before any attempt was made to effect the usual substitution of names in the Revenue Office. The witnesses, who verified the sale deed at the Office of Registry, state, that payment was not made in their presence. There is strong reason to think that these persons attested the execution of the deed as well as verified it at the Office of the Register, and that, therefore, if the money had been paid, as said by plaintiff, it must have been paid while they were present. There is reason to think this, because the name of one of the witnesses to the Registry, Hurjee Mull, is written exactly in the place in which it might be expected to appear, viz. in the very beginning, if Hurjee Mull had been the first to attest the execution of the deed; whereas he had not been then present, but had verified the deed at the Registry Office only, as is asserted on the side of the plaintiff, his name would appear at the end of the list of names. Again, it is most improbable that the plaintiff, provided as he was, by his own account, with abundant evidence to show that the money had been paid, should not have resented to the Register of Deeds two witnesses, who could speak to that fact, instead of two witnesses who could not depose to it, and his meeting with whom at the Registry Office would not even appear to have been pre-arranged. And the improbability is heightened by the circumstance, that some of those before whom the plaintiff states the money to have been paid, were, as appears in evidence, actually present in Court at the time of verifying the deed before the Register, and yet were not called by the plaintiff. I consider the rejection of the claim to be just, and dismiss the appeal.

The 5th December, 1851.

Present: { A. W. BEGBIE, } Judges,
 { H. W. DEANE, }
 { S. S. BROWN, Offg. Judge.

CASE No. 219 OF 1850. { Regular appeal from the decision of
 Sudder-ood-deen Khan, Principal
 Sudder Ameen of Dehlie, dated 20th
 August 1850.

OODHOO DASS, (*Plaintiff*), *Appellant*,
 versus

SALIKRAM AND OTHERS, (*Defendants*), *Respondents*.

CLAIM, to establish the right and title of Bhugwan Dass to eight biswahs of mouzah Wyseree, and to sell the same in satisfaction of a decree had against Bhugwan Dass. The suit is valued at the amount decreed to the plaintiff in his suit against Bhugwan Dass, viz. Rs 5,535-9-6.

The plaint shows that a twelve-biswah share in the above mouzah belongs to zemindars of the *rora* caste, and an eight-biswah share to *byragees*. Bhugwan Dass, against whom the plaintiff got a decree, is represented to have possessed the eight biswahs. His *gooroo*, *mahunt* Mungul Dass, two years before his death, made his *chela*, Bhugwan Dass, proprietor. Mungul Dass had on several occasions borrowed from Beharee Lall and Ramsuhae, bankers, money for expenses of the religious institution of which he was trustee, on the security of these biswahs. Bhugwan Dass' *chela* took upon himself the debts of his *gooroo*. When Bhugwan Dass became himself *mahunt*, he too borrowed money in a similar way for similar objects. The *soukars* having shown some impatience for their money, Bhugwan Dass mortgaged the eight biswahs for Rs. 3,000, writing a formal deed of mortgage. He paid, out of the money advanced to him, Rs. 1,900 to the *mahajans*, and retained Rs. 1,100 for the expenses of the *faqeeers*. Bhugwan Dass deprived the plaintiff of the occupancy of the property, whereupon the plaintiff sued Bhugwan Dass, and, on 14th December 1848, obtained a decree against him. Bhugwan Dass died, and when the plaintiff put his decree in execution, and sought to bring the property to sale, the defendants came forward as objectors. The Principal Sudder Ameen, on 19th June 1849, passed an order, in the miscellaneous department, to the effect, that the Settlement *iktrarnamah* described the property to be *mal wuqf*, not transferable by sale or mortgage; and he directed that the attachment be taken off. The decree-holder appealed summarily, but without success. It is contended,

by the plaintiff, that the eight biswahs were the property of the person cast in the suit, that the money was borrowed for religious purposes, and that when money is lent on the security of a particular property, the lender, on obtaining a decree, must necessarily have the power of bringing the property to sale. The mortgage deed was attested by two of the very persons who are now *oozurdars*, and one of them verified the deed at the Registry Office. It is clear, therefore, that the expenditure of the money by the *mahunt* was approved by the community, and that those who now object assented to the mortgage transaction. The plaintiff took all requisite precautions, a formal deed having been executed, and registered and witnessed by other persons as well as by the objectors. In regard to the plea that the Settlement does not invest the *mahunt* with the power of alienation, that plea may be met in two ways: 1st, the mortgage took place in March 1845, and the *ikrarnamahs* of Settlement are dated subsequently, in 1847 and 1849; had the *ikrarnamahs* been of prior date to the mortgage, the plea might have been of force:—and 2nd, previously to the *ikrarnamahs* no paper can be produced, which will show that alienation by a *mahunt* for requisite expenses is unlawful. The *maaffee* of the village is an *istumraree* tenure at the will of the ruling power; and the biswahs in dispute were purchased by a *mahunt*. There is no *sunnud* showing the mortgaged property to be *mal wuqf*.

The defence, after certain technical objections, which need not be set forth at length, proceeds to point out that the purchase of the eight biswahs having been made for the service of a temple, they cannot be sold or otherwise alienated, being *mal wuqf*, the *mahunt* for the time being having bought the *zemindaree* right in the biswahs, with the object of devoting the proceeds to religious service. The biswahs did not belong to Bhugwan Dass in such manner as to entitle him to make any disposal of them in mortgage. No money was ever borrowed from bankers, formerly, on the security of this land. That plaintiff, in collusion with Bhugwan Dass, executed a mortgage for the purpose of injuring the body of *faqeeers*, and fraudulently entered the names of the *oozurdars*, as witnesses to the transaction. The defendants protested against the verification of the mortgage deed. Then, as to the fact that the mortgage deed is prior in point of time to the Settlement *ikrarnamahs*, it is answered, that the Collector, having ascertained the land to be *mal wuqf* desired Bhugwan Dass to write the *ikrarnamah*. There was no *mahunt* after the death of Mungul Dass, and Bhugwan Dass was nominated *mahunt* at the Settlement. He could not mortgage as *mahunt* before his accession to that office. The disputed biswahs were bought with the proceeds of the *istumraree* tenure, and belong to the temple,

and whatever belongs to a mosque or temple is inalienable, the *mutawallee*, or *mahunt*, having control over the expenditure, and no further authority whatever.

The Principal Sudder Ameen has observed that the defence makes out the property to be *mal wuqf*, the proceeds being devoted to *faqueers*. The point to be determined is, therefore, were the eight biswahs the property of Bhugwan Dass against whom the decree passed, and could he legally sell or mortgage them, or are those biswahs strictly *mal wuqf*? The lower Court held that they are, and that the evidence shows that they were not purchased either by Bhugwan Dass or the former *mahunt*, Mungul Dass. It is clear to the Principal Sudder Ameen, from the Collector's *roobakaree*, that the biswahs are *mal wuqf*, the inalienable property of a temple. The proceeding of the Collector, under date 15th April 1841, shows that the tenure is *istumraree*, for the support of a temple, and since the land cannot be considered the private property of the individual against whom a decree has been had, they may not be brought to sale. The assertion by the plaintiff, that debts contracted by a former *mahunt* were paid with part of the mortgage money, does not help the plaintiff's case. Two defendants, Salikram and Kesho, admitted the claim, after this manner; they agreed to pay from the proceeds Rs. 350 per annum, but such an admission cannot be taken into consideration, as what the plaintiff contends for, is the right to bring the biswahs to sale as the property of Bhugwan Dass. Moreover, (the Principal Sudder Ameen remarked) the two defendants, who made the admission, have no special connexion with these biswahs, but are in the same position as the *faqueers* of the temple. Whenever an attempt is made to sell *mal wuqf*, it is open to every party interested to put down the attempt. The lower Court dismissed the claim.

It is pleaded, in appeal, that there are two distinct kinds of right in the mouzah: the *istumraree* of the whole 20 biswahs, and the *zemindaree* right in 20 biswahs, of which latter, an eight-biswah share was bought with the money of Mungul Dass, and came by inheritance to Bhugwan Dass. The plaintiff does not desire to sell the *istumraree*: the *roobakaree* of the Collector of 15th April 1841, has no reference whatever to these eight biswahs. The Principal Sudder Ameen has confounded the *istumraree* tenure with the *zemindaree* title, acquired by purchase. There is no mention of these eight biswahs in the Collector's *roobakaree*, and the *ikrarnamah* of 5th December 1847, will not suffice for the defendants' purpose, seeing that the mortgage took place in 1845, that two of the defendants, Salikram and Ramkishan, witnessed the deed, Salikram verifying it at the registry office: it is evident, therefore, that the declaration, two years afterwards,

that the property is *mal wuqf*, was made solely with a view to injure the plaintiff. The appellant adds that a confession of judgment, in whatever terms couched, or of whatever nature, ought to be acted on, and the defendants, Salikram and Kesho, have agreed to pay Rs. 350 per annum from the proceeds of the biswahs; the plaintiff did indeed sue with the object of bringing the biswahs to sale, but all he desires is, to get the money due to him.

The Court find, from the record, that two distinct descriptions of right have long existed in the mouzah, an *istumraree* holding of 20 biswahs by the *byragees*, for the support of a religious institution, and a *zemindaree* holding of 20 biswahs, with the customary rights and privileges of proprietors, by the remaining portion of the community. In coming to a decision in the case, the Principal Sudder Ameen has not been careful to view these two kind of rights separately, but, in apparent ignorance of the subject, has blended and confounded the two together. He points to the Collector's *roobakaree* of 15th April 1841, as showing that the disputed property is *mal wuqf*, but that *roobakaree* refers to the *istumraree* tenure only, not at all to the contested eight-biswah share. It is admitted by the defendants that *mahunt* Mungul Dass purchased the share from the zemindars, with the common money of the corporation, and the Court find that Bhugwan Dass, as successor of Mungul Dass, and trustee of the institution, *bond fide* executed a mortgage of the eight-biswah share to the plaintiff. There were four defendants in the lower Court, Bunsee Dass, Salikram, Ramkishen and Kesho Dass. Of these, Bunsee Dass, is dead; Salikram and Ramkishen attested the mortgage deed executed in the plaintiff's favor; and Kesho Dass, though he does not appear to have taken an active part in that transaction, gave in, in conjunction with Salikram, an *ikbal davee* in the lower Court, expressive of his readiness to satisfy the plaintiff by a fixed annual payment. The assent therefore of the parties interested in the transaction is sufficiently made out, and there can be no reason why the plaintiff should not bring to sale the eight-biswah share in satisfaction of his decree, unless there be proof of the plea that the share being *mal wuqf* is inalienable. The Court hold this plea to be not substantiated. The eight-biswah share forms no part of the original endowment, which will still retain its entirety if the share is transferred by sale: there is no *wuqfnamah* or record of an endowment, as respects the disputed share, prior to the date of the mortgage. It is obviously nothing to the purpose that the *byragees* intimated to the Collector in 1847, or two years after the mortgage, that the property is *mal wuqf*, for such intimation at such a time can only be looked upon as a fraud, whereby the plaintiff's lien on

the share might be got rid of: and in buying a portion of their rights from the zemindars, the corporate body of *faqueers* constituted for themselves a property independant of the endowment, a property held under a lay title, upon which the laws in force for the satisfaction of decrees may strictly and fully be brought to bear.

For these reasons, the Court reverse the judgment of the Principal Sudder Ameen, and pass a decree in favor of the plaintiff.

The 15th December, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 53 of 1851. { *Special appeal from the decision of W. Cowell, Esq., Judge of Bareilly, dated 9th March 1848.*

MOBARUK BEGUM, (Plaintiff), Appellant,
versus

ZYNOOLABIDEEN, (Defendant), Respondent.

THE particulars of this case are as follows. Nuwab Zekereeah Khan, husband of Moobaruk Begum, assigned to her, by deed of gift in lieu of dower, seven villages held by him in *istumarar* tenure, and gave possession : some years afterwards, the Nuwab changed his mind, and instituted a suit to set aside the deed ; he died during the progress of it, and Kasim Ali Khan and Yousuf Ali Khan prosecuted it as his representatives. The suit was dismissed by the Judge, on the 16th September 1831, and, on the 27th November 1832, the decision was upheld in appeal by the Provincial Court. Mobaruk Begum being thus confirmed in her title and possession.

Mobaruk Begum afterwards put the villages under the charge of her son, Zynoolabideen, as her *mookhtear*; but being dissatisfied with his management, she brought a suit to dispossess him, and obtained a decree from the Principal Sudder Ameen on the 25th June 1841, which was appealed by the defendant to the Judge. Whilst the case was pending in appeal, a letter was issued by the Government, under date the 8th January 1842, ruling, that the members of the family of Hafiz Ruhmut were not competent to convey away more than a life interest in their *istamarar* villages, and, on the strength of it, the Judge, being of opinion that the plaintiff's title was no longer a valid one, proceeded to dismiss the suit without reference to the merits. The Judge's order

of dismissal was upheld in special appeal, on the 9th January 1844.

Yousuf Ali Khan and Kasim Ali Khan, finding Moharuk Begum's special title disallowed by the Government and the Courts, then renewed their suit, which was brought by them, as sons of the deceased Nuwab by another wife, for their share of the property against Zynoolabideen, the party in possession, and obtained a decree, which was upheld in appeal by the Judge, and in special appeal, by the judgment of this Court, dated the 1st April 1847.

In the interim, the Government had cancelled, in a letter dated the 29th May 1845, the restrictive rule previously imposed, and declared that no interference would be exercised in the conveyances made by the family of Hafiz Ruhmut. Mobaruk Begum in consequence of this letter had recourse once more to the Courts, and, on the 11th January 1848, instituted a suit against Kasim Ali Khan, Yousuf Ali Khan and Zynoolabideen, to recover possession of the villages decreed to her by the judgments of the Courts in 1831 and 1832, on the ground that the withdrawal of the restrictive order had restored her right and title to the *status quo ante*, in which it had been fixed by those decrees. The suit was dismissed by the Principal Sudder Ameen in the following judgment. "In my opinion, the Court is not competent to take cognizance of the plaintiff's claim. The deed of gift, which is the ground on which the claim is based, has been declared invalid by the superior Courts. Whilst the decrees of the Judge and the Sudder Dewanny Adawlut continue in force, this Court cannot move in plaintiff's case." This decision was upheld by the Judge.

The decrees here referred to, as operating as a bar to the adjudication of the suit, are the decision passed by the Judge in plaintiff's suit with her son Zynoolabideen, and the order of rejection of the special appeal of the 9th January 1844; plaintiff, finding that she had followed the wrong course in her attempt to recover the rights claimed by her has now taken the right one, and has applied for a review of the order of this Court of the above date, which has been admitted.

The Court find, from the petition of review, that the cancellation of the Government order at an after date has been made the chief reason for the review sought for. The reason cannot be considered a sound one, for if this were the only ground for the review, and if the Government order during its currency were to be regarded as binding on the Courts in their former adjudication of this suit, then the Judge was right in dismissing the suit, and the rejection of the appeal was also right. The reasons should rather have been drawn from any defectiveness that pre-

sented itself in the decisions of the Courts; but, under the circumstances of the case, and with reference to the comprehensive terms* of the Clause 3, Section 4, Regulation XXVI. of 1814, the Court are of opinion that the inadvertence of the pleader in the use of a wrong argument should not be allowed to deprive the appellant of the benefit of the law, which the facts clearly entitle her to claim.

The Court consider that in the suit instituted by the plaintiff under a title already secured to her by the concurrent judgments of the Civil Courts, the Judge was in error in rejecting it on grounds foreign to the issue between the parties. There was no occasion for the Judge to have gone out of his way in search of any uncertain and contingent interest, which the Government might have in the suit, and the case was not one of the class provided for in the Clause 3, Section 2, Regulation XXXI. of 1803, in which the Courts of judicature are required to refer to the orders of the Government. The long and fruitless litigation that followed, has been the result of this error, and the Court now cancel the decision of the Judge, and remand the case to the Judge's Court, in order that it may be disposed of on the merits.

The 15th December, 1851.

Present : { A. W. BEGBIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE NO. 228 OF 1851. { *Special appeal from the decision of S. Fraser, Esq., Judge of Bareilly, dated 16th July 1849.*

MOBARUK BEGUM, (*Plaintiff*), *Appellant,*

versus

YOOSUF ALI KHAN AND KASIM ALI KHAN, (*Defendants*),
Respondents.

THIS case is connected with the case of review of judgment, No. 53, disposed of to-day, in which the particulars have been fully detailed. The special appeal has been preferred from the decision of the Judge in the suit instituted by the appellant, on the 18th January 1848, and it was admitted, together with the review, in order to try, whether the reasons assigned for the dismissal of the suit were correct.

The Court are of opinion that the Judge and the Principal Sudder Ameen could not have decided otherwise than they have.

There can be no doubt that the appellant followed a wrong course in instituting her suit in the face of the preceding decree of the Judge of the 9th March 1843, which disallowed her title. Her remedy lay in the review of judgment, which she has to-day obtained, and which should have been applied for at the time, and not in a second suit, in which the Courts could not move as long as the decree, declaring her claim invalid, remained in force. The Court find no error in this respect in the judgment appealed from, and they accordingly dismiss the appeal, with costs.

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The 18th December, 1851.

Present: H. W. DEANE, Judge.

CASE No. 64 OF 1851. { *Regular appeal from the decision of
S. S. Brown, Esq., Judge of Agra,
dated 4th February 1851.*

WILAYET ALI SHAH, (*Defendant*), *Appellant*,
versus

JOWAHIR SINGH, (*Plaintiff*), *Respondent*.

THIS suit having been tried in the Judge's Court, full particulars of it are to be found in the usual place, in the volume of printed decisions, page 5.

The pleas put forward in appeal vary but slightly from those which were previously urged in defence. The appellant insists on the enmity shown to have subsisted between himself and the plaintiff, so as to prevent money dealings between them: on his absence from Agra at the date on which the bond is said to have been written, on the fact that, although the plaintiff described him as his (plaintiff's), *karindah* at the time of the bond, he did not become his *karindah* till nearly two months afterwards; on the want of resemblance between the defendant's real seal and signature, and the seal and signature borne by the bond, and on the fact that the *kyfeet* of the *mohafiz duster* shows the bond to be forged in several places.

There is nothing in these pleas, which would justify interference with the decision of the Court of first instance. The quarrel between the parties is of date subsequent to the execution of the bond, not before it: it is true that the defendant brought witnesses to swear that he was absent from Agra; but this plea of absence, the effect of which, if proved, would necessarily be to throw out the plaintiff's claim at once, was not put forward, as it naturally would have been, if worth any thing, in the answer to the plaint, but in the rejoinder; the amended plaint

explained that the transaction arose out of a *theeka*, and that it was inadvertently said to have arisen out of the connexion formed in consequence of the defendant having become *karindah* of the plaintiff; the alleged discrepancy between the defendant's seal and signature, and those exhibited on the bond, is mere matter of assertion; and the *kyfeet* of the *mohafiz dufier* does no more than point out that the letters on the seals of some of the attesting witnessess are not distinctly legible, and that the bond is blotted over, here and there, in unimportant parts of it, however, in places where nothing could be gained by fraudulent alteration. I dismiss the appeal.

The 20th December 1851.

Present: A. W. BEGBIE, Judge.

CASE No. 213 OF 1851. { *Special appeal from the decision of J. S. Clarke, Esq., Judge of Azimgurh, dated 13th August 1851.*

BOODHA SINGH AND OTHERS, (*Defendants*), *Appellants*,

versus

GOOLZAR SINGH, (*Plaintiff*), *Respondent*.

FOR the particulars of this case see pages 93 and 94 of the printed decision for Zillah Azimgurh, for the current year. A special appeal is admitted "to determine, whether the decisions of the lower Courts are not incomplete, inasmuch as the Principal Sudder Ameen and Judge have omitted to notice and adjudicate on a material plea urged by one of the defendants." The Court observe that, among the objections urged by the defendants, it is stated that one of their number, Hurpal Singh, was a minor, at the time that the alleged deed of sale purports to have been executed. This allegation is contradicted by the plaintiff in his rejoinder, he maintaining that Hurpal Singh was of full age at the period in question, and on this issue was joined. It was incumbent on the Principal Sudder Ameen and Judge to notice and adjudicate on this plea; which, if established, would materially influence the ultimate judgment of the Court, as regarded the authenticity of the deed of sale. But the point has apparently escaped their notice altogether. It is necessary therefore to remand the case to the Principal Sudder Ameen, in order that the defect in his judgment may be rectified. The lower Court will confine themselves to the consideration of the single point now noticed, the other objection to the decision urged by the appellants not appearing to the Court to call for notice.

The 3rd December, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 6 OF 1851. { *Regular appeal from the decision of J. P. Gubbins, Esq., Judge of Dehlie, dated 25th November 1850.*

MIRZA ABDOOL MOOMUN AND OTHERS, (*Defendants*), *Appellants*,
versus

THE AGENT, IN BEHALF OF THE KING OF DEHLIE, (*Plaintiff*),
Respondent.

Suit, for possession of 380 yards of ground with a well, value Rs. 580.

The plaint sets forth, that the ground claimed was part of a building known as the *huvelee Sahiba Muhul*, which had always been royal property, and that defendants, some years before, had taken unjust possession of it. A complaint was preferred at the time to the Magistrate, who referred the plaintiff's constituents to the Civil Court, and the suit has been brought accordingly.

Defendants, in their answer, asserted long possession, and pleaded the limitation statute. They denied that the ground was included in the *tuyool*, or royal possessions, and alleged that the private property of the Princess Sahiba Muhul had devolved to them by inheritance, and that the King's servants had sned them formerly for the recovery of a loan advanced on a mortgage of the property, and had thereby recognized their title.

In the replication, plaintiff stated that the ground had not at any time formed part of the private property of the Princess Sahiba Muhul; that it had been held along with other *tuyool* lands, under grants from the crown, resumable at will; that the defendant, Abdool Moomun, had formerly brought a suit for the *huvelee* and other property, as heir of Sahiba Muhul, which he had lost, and that the ground was distinct from, and formed no part of, the house, which the defendants held by private right, as descendants of the Princess.

Defendants, in their rejoinder, re-affirm their right by inheritance and possession to the estate at large of Sahiba Muhul.

The Judge, in his interlocutory proceeding, overruled the plea of limitation, on the ground that the evidence adduced in disproof of the preliminary plea was sufficient to give plaintiff a cause of action within the period allowed by law, but in the recorded decision, the reasons are made to rest on the fact of a general renunciation of all claims to the *tuyool*, which had been assigned to the Princess Sahiba Muhul for her life-time, having been executed by the defendant Abdool Moomun, in 1835, and

on a declaration on oath of the right of the crown, which had been made by him in the following year. This renunciation and declaration were considered to be not only conclusive against the plea of limitation, but to be decisive of the question of right also.

In appeal, the defendants renew their objection under the limitation statute, and urge that the renunciation and declaration had no reference to this ground, and supposing such to be the case, still, that the alleged acknowledgments did not fall within the limitation from the date of suit, and could not be pleaded against them now. They further plead that the respondent's constituents had formerly taken a mortgage of the *huvelee* from them, and that, as the Judge's decision showed the ground to be a part of the *huvelee*, it followed that the right to the ground was clearly theirs.

In determining the plea of limitation, the renunciation and declaration referred to by the Judge, which are both of a date beyond the legal period, must be put out of view. A presumed defect of title on the side of the appellants will not give the respondent a right to question it unless proof of proprietary possession within the limitation can first be shown. The evidence produced by each party on this point is, as usual, directly contradictory, but the proof is stronger on the side of the respondent, and I am of opinion that there is sufficient evidence of the ground having been used by the King's household for different purposes by right of their possession of the *huvelee* up to the year 1842, when the attempt of the appellants to convert it to their own use, brought the dispute before the Magistrate, whose summary order cannot be received as an indication of the fact of possession for the several years preceding it.

The question of right in the case being intimately connected with the fact of possession, the finding under the limitation plea will equally rule the decision on the merits. The deed of renunciation and the after declaration do not contain any mention of this ground in particular; but it is observable that the appellants have nowhere fairly met the averment of the respondent, that the ground was part of the *huvelee* Sahiba Muhul. They evade it when it was pressed upon them in the replication, and by pleading the mortgage deed and their general right of inheritance from Sahiba Muhul, they ardently wish it to be understood that their right to the *huvelee* itself invested them with the right to the ground attached to it. In their reasons in appeal, this right to the *huvelee* is directly affirmed, and the Judge's decision is used as an argument in support of their right to the ground also. It is, however, clearly shown from the mortgage deed, that the property mortgaged by appellants was not the

huwelee Sahiba Begum, which was included in the renunciation deed, but their private dwelling house, which had been separated from the *tuyool*, and held by the descendants of Sahiba Muhul after her demise. These deceptive pleadings and misstatements afford a strong reason against the justice of their cause. The decision is affirmed, with costs, payable by the appellants.

The 27th December, 1851.

Present: S. S. BROWN, Offg. Judge.

CASE No. 93 OF 1851. { Regular appeal from the decision of Qazie
Yar Ali Khan, Principal Sudder Ameen
of Jounpore, dated 25th March 1851.

BUNDOO SINGH AND OTHERS, (*Defendants*), *Appellants*,
versus

BABOO GUNGABISHEN SINGH, (*Plaintiff*), *Respondent*.

THE plaintiff sues for possession of 147 beegahs 13 biswahs of land within the boundaries specified in their plaint, valued, by the estimated selling price, at Rs. 3,500, and for the restoration of the boundary line laid down by the revenue authorities at the time of the general demarcation, with Rs. 4,856-6, *wasildt*, with interest, from the year 1248 to the end of the half year of 1257 Fuslee: total value of suit, Rs. 8,356-6.

The plaint enters in considerable detail into the past history of the boundary disputes between their village of Kishenpore, and the defendants' village of Pilknee, up to the year 1840; when, on the occasion of the demarcation, an arbitrator was nominated by both parties for the adjustment of the boundary; and an award was given in, which was accepted by the revenue authorities. It goes on to state that the defendants had, notwithstanding, managed to dispossess him shortly afterwards; and, in a dispute relative to 50 beegahs of the land, which carried both parties before the Magistrate, that the possession of the defendants was upheld. The plaintiff now brings his action for the recovery of the land on the basis of the boundary, as fixed by the award.

The defendants raised several technical objections to the suit, and pleaded, that it was barred by limitation. After replies to the statements of the plaintiff, regarding the circumstances of the dispute prior to the year 1840, they plead, that the arbitration was only empowered to determine the boundary of the uncultivated land, not of the cultivated; that the arbitrator had exceeded his jurisdiction in deciding as he had done, and that the award was, consequently, invalid. It is further pleaded, that a suit for the

purpose of enforcing an award given in the Revenue Courts under the Regulation IX. of 1833, could not be sustained, and that plaintiff had first brought a suit against them for 50 beegahs only, in which he had been nonsuited, which claim has been augmented by him now to 147 beegahs 18 biswahs.

The Principal Sudder Ameen in his decision summarily overruled an objection of under-valuation, which had been put forward by the defendants, and disallowed the limitation plea, on the ground that the suit was within time from the date of the award. He was of opinion, for the reasons stated, that the results of the suits between the parties prior to the arbitration were favorable to plaintiff's present claim, and that the award, which had been regularly delivered and accepted, should be upheld. The objection to the arbitrator's jurisdiction is set aside by a reference to the terms of the arbitration agreement and award. The plea against the regularity of the suit is also disposed of on certain precedents of the year 1848. The judgment concludes with a decree for the claim, and for *wasilat*, reduced to the sum of Rs. 2,060-10.

In appeal, the defendants plead that sufficient attention was not given to their objection of under-valuation; and they re-state their case at great length, with the reasons and arguments already urged by them in the lower Court.

There is no reason for interfering with the decision of the lower Court, in regard to the plea of under-valuation. It would have been more in accordance with the rule in paragraph 2 of the Circular Order of the 13th September 1843, for the Principal Sudder Ameen to have disposed of this objection in the proceeding held under Section 10, Regulation XXVI. of 1814, before proceeding to the merits; but, although the appellants did object in vague and general terms in their answer to the respondents' valuation, they did not specify any other amount at which it should have been valued, which it was incumbent on them to have done, under the rule laid down in the note to Article 8, Schedule B, Regulation X. of 1829; and it was not necessary for the lower Court to bestow further attention on an objection advanced in so loose a form.

The points for decision in the case lie within a very narrow compass, and much of the detail, with which it has been encumbered, might have been advantageously spared. The plea of limitation has already been satisfactorily disposed of by the Principal Sudder Ameen. The cause of action is the award, and as the suit has been preferred within twelve years from the date of it, the fact of possession, or the results of the litigation between the parties prior to it, cannot now be pleaded or enquired into.

The arguments advanced by the appellants, under the Construction 895, against the regularity of the suit, have been sufficiently met by the decision of this Court of the 29th July last, No. 160, in an analogous case, in which the Construction was explained as having reference to awards delivered in the Revenue Courts, which the parties holding them sought to have summarily enforced by the Courts in the manner prescribed for the execution of private awards in Clause 2, Section 3, Regulation VI. of 1813, and to such cases only. The present suit is brought for the enforcement of a right on the award as on a title deed, and is as open to adjudication as suits on other title deeds.

The reasons against the validity of the award is not supported by the documents filed in the case. The arbitration agreement certainly specifies that the boundary marks should be laid down for the uncultivated land on the outer boundary line between the two villages; but it also distinctly empowers the arbitrator to settle the dispute regarding the cultivated land also, and it is obvious that, unless the adjustment had included both cultivated and uncultivated, no demarcation could have been made at all.

The reasons founded on the augmentation of the quantity of land over the land claimed in the former suit is of no weight. The dispute and claim were then limited to 50 beegahs. The present suit takes in all the land in the possession of appellants beyond the boundary laid down in the award, and appellants have no where pleaded that it includes more.

I therefore confirm the decision of the lower Court, with costs of appeal payable by the appellants.

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The 29th December, 1851.

Present : $\left\{ \begin{array}{l} \text{A. W. BEGBIE,} \\ \text{H. W. DEANE,} \\ \text{S. S. BROWN,} \end{array} \right\} \begin{array}{l} \text{Judges,} \\ \\ \text{Offg. Judge.} \end{array}$

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CASE NO. 7 OF 1851. $\left\{ \begin{array}{l} \text{Regular appeal from the decision of} \\ \text{J. P. Gubbins, Esq., Judge of Dekhie,} \\ \text{dated 21st November 1850.} \end{array} \right.$

MIRZA AZEEZ-OD-DEEN AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

MOHUMED BUKSH AND OTHERS, (*Defendants*), *Respondents*.

THIS suit having been tried in the Judge's Court, a report of it will be found in the volume of printed decisions, page 219.

The plaintiffs appeal from that part of the decision of the lower Court, which, while it recognizes the right of the plaintiffs and gives them a decree for the thing sued for, annexes a con-

dition, which the plaintiffs deem vexatious. The words of the Judge are, "all tend to convince me that the buildings in question were erected for religious purposes; and therefore, while I adjudge to the plaintiffs' possession of the same in preference to the defendants, I think it proper to record that this judgment conveys to them no power whatever either to destroy or to sell the same, with this reservation, I decree in the plaintiffs' favor, with costs."

The defendants not having appealed, nor having appeared as respondents on the appeal of the plaintiffs, the decision of the Judge cannot of course be altered unfavorably for the plaintiffs, and the only point, therefore, to which the Court have to look, is, whether the decree, which the plaintiffs have obtained, ought to be fettered with the above restriction or not. The Court are of opinion that it ought not to be so fettered. The plaintiffs sued for the ground and buildings as their hereditary property: it was pleaded in defence that the defendants had long had possession, and that the property is *mal wuqf*. The Judge remarks, that "the defendants' claim is a purely fictitious one," and such being the finding of the Judge, and the pleas in defence having been rejected accordingly, the Court do not understand why the Judge should go out of his way to invest the property with a peculiar character, which the plaintiffs did not plead for it; and which the Judge in effect disallowed when he disposed of the objections in defence. The Court amend the Judge's decision, and declare the plaintiffs entitled to possession of the property: decreed to them without any reservation whatever.

The 29th December, 1851.

Present: { A. W. BEGBIE, } *Judges.*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offy. Judge.*

CASE No. 96 OF 1851. { *Regular appeal from the decision of*
 J. P. Gubbins, Esq., Judge of Dehlie,
 dated 2nd April 1851.

JOSEPH SKINNER, (*Defendant*), *Appellant*,
 versus

L. P. LYONS, AGENT OF J. P. LARKINS, MANAGER OF THE AFFAIRS
 OF D. O. DYCE SOMBRE, A LUNATIC, (*Plaintiff*), *Respondent.*

THIS suit having been tried in the Judge's Court, a report will be found in the usual place in the volume of printed decisions.

It is urged, in appeal that the transaction took place at Calcutta, on the 11th March 1838, the deed having been executed on the 14th May 1838; and that as the cause of action arose on the former date, the suit, brought on the 14th May 1850, cannot be heard. That the depositions of Baillie, Molloy and Co., and of one Harrington, were not taken, the Judge having relied on the evidence to demand of payment put in by Mithun Lall and Jowahir Singh, who have long been in the service of the plaintiff. That inconsistencies are observable in the testimony of the witnesses; that the document tendered in proof of the claim bears the word "form" upon it, and that the place wherein the period of re-payment should have been noted is left blank, and that a decree cannot be passed on the faith of a deed so imperfect; that the evidence to the hand-writing of the defendant is not satisfactory; that there is no sufficient proof of demand having been made in January 1849, and that no Circular Order or other authority is citeable for charging interest, as it has been charged in this case; that although the Judge has observed, that the defendant could not deny the genuineness of the deed, yet he did in effect deny it, having pleaded in his answer to the plaint that all accounts between the plaintiff and himself had been adjusted; and, finally, that it does not appear from the decision that the receipt of the money by the defendant has been established to the Judge's satisfaction.

The Court see no reason to question the justness of the claim, and they concur with the Judge in holding it to be made out by the evidence that payment was demanded, and the debt admitted by the defendant, in 1849. They are of opinion, however, that the decree must be altered as respects the award of interest. It is expressly stipulated in the document, in which the defendant acknowledges the receipt of the money, that the money is lent "without interest:" the case does not fall within the operation of Act XXXII. of 1839; the expression in that law being "so as such demand, (*i. e.* in writing,) shall give notice to the debtor, that interest will be claimed from the date of such demand until the term of payment," and on the present occasion it is not even attempted to be shewn that notice to the above effect was given to the debtor. Interest is therefore chargeable only from the date of suit to the date of realization of the decree. The Court are pleased to modify the Judge's decision accordingly.



The 29th December, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 518 OF 1851. { *Special appeal from the decision of J.
Lean, Esq., Judge of Mooradabad,
dated 10th March 1851.*

HOOLAS RAE AND ANOTHER, (*Plaintiffs*), *Appellants,*
versus

FUTTEHCHUND AND OTHERS, (*Defendants*), *Respondants.*

THE volume of printed decisions gives full particulars of this case.

A special appeal was admitted to try, whether it was competent to the Judge, on appeal by the plaintiffs, from an order of nonsuit, to dismiss *in toto* the claim of the plaintiffs.

The Court are of opinion that the course pursued by the Judge is not sanctioned by judicial usage. The plaintiffs dissatisfied with the Moonsiff's order of nonsuit applied to the Judge for its reversal; if the Judge considered the order to be correct, he should have dismissed the appeal; if not, he should have remanded the case for retrial on its merits. The Moonsiff was in error in entering at all on the merits of the claim, at the same time that he nonsuited; but this error, on the part of the Moonsiff, by no means left the Judge at liberty to deviate from established practice, and to dismiss the claim altogether.

The suit is sent back to the Judge's file, in order that he dispose of it anew, with reference to these observations.

The 29th December, 1851.

Present: { A. W. BEGBIE,
H. W. DEANE, } *Judges,*
S. S. BROWN, *Offg. Judge.*

CASE No. 26 OF 1851. { *Regular appeal from the decision of Mo-
humed Qasim Ali Khan, Principal Sud-
der Ameen of Saharunpore, dated 16th
December 1850.*

KHAJEH BUKSH KHAN, *alias MUNNOO KHAN, (Plaintiff),*
Appellant,
versus

KADIR BUKSH KHAN AND OTHERS, (*Defendants*), *Respondents.*

THIS is a suit to recover possession of half of certain *maaffee* lands, orchards, and other real property, with *wasildt*, to the

amount of Rs. 9,740-8. Plaintiff states his case as follows. The entire property, of which he now claims a moiety, had belonged to Mussumat Arzoopae, (mother of himself and the principal defendant, Kadir Buksh Khan,) on whom it had been bestowed by Foujdar Beebee, her aunt, by the mother's side. On the death of their father, Kamyab Khan, twenty-three years since, plaintiff and defendant, by permission of their mother, took equal and joint possession of the property, and, on the death of their mother, nine years ago, the same occupancy continued. About three years since, the defendant, Kadir Buksh, attempted to get possession of Khirkhee, a village belonging exclusively to plaintiff, but was prevented doing so by an order of the Foujdaree Court. He then sued in the Civil Court with the same object, but was again defeated. The defendant then cut down five trees in one of the gardens in their joint possession, and plaintiff complained in the Foujdaree Court, but was referred to a Civil suit. Availing himself of this success, the defendant, Kadir Buksh, entirely dispossessed plaintiff from the property. Plaintiff thereupon instituted a suit in the Civil Court, but was nonsuited, and now renews his suit. The other defendants were made parties to the suit, *pro forma*, they being in part possession of some of the property.

The defendants, Kadir Buksh Khan and Mussumat Pearee Khanum, (his wife) in reply, stated, that the property in dispute had never belonged to Mussumat Arzoopae, but, with exception of certain portions, which they specify as having been acquired or created by Kadir Buksh Khan himself, appertained to the estate of Kamyab Khan, (father of plaintiff and the defendant Kadir Buksh Khan,) who had received it in gift from Gholam Mohumed Khan, his maternal grandfather, under a deed dated 11th Shaban, 1187 Fuslee. Kamyab Khan had three sons, and of them had selected the defendant, Kadir Buksh Khan, as the most deserving; and had bestowed the whole of his property on him, to the exclusion of his brethren, under date 11th Rubbeeool-uwul, 1225 Hijree. The seal of Mussumat Foujdar Bebee was attached to the *hibbehnameh* executed in favor of Kamyab Khan, by Ghoolam Mohumed Khan, which shews that Foujdar Bebee was not the proprietor. In his reply to the suit instituted by defendant, Kadir Buksh, against the plaintiff, regarding mouzah Khirkhee, the latter had stated that the whole of the disputed property belonged to Kamyab Khan; thus contradicting his present declaration, that it had belonged to Mussumat Arzoopae. Mussumat Arzoopae herself, in a petition preferred to the Civil Court, under date 14th March 1836, had stated that, with the exception of 26 beegahs of *maafee* land, and one-eighth share of a house, she was possessed of no property. Under no view of the

case was the plaintiff entitled to half of the estate of Kamyab Khan, who left three sons and a daughter; and even had the property descended to the children, in the ordinary course of inheritance, plaintiff's share would have been only two-seventh.

The defendants, Ameer-ood-deen and Faheem-oon-nissa, Sirdar Beebee and Fyzyab Khan and others, filed three separate replies, all to the same purport as that of the defendants, Kadir Buksh Khan and Pecaree Khanum. The defendants, Moobaruk-oon-nissa and Fussee-oon-nissa, filed a separate reply in regard to one of the orchards, which was in their possession.

The Principal Sudder Ameen dismissed the plaintiff's claim on the following grounds. He observed that the question at issue between the parties was, whether the property had belonged to Mussumat Arzoopae or to Foujdar Khan, and whether plaintiff had obtained possession as the heir of Arzoopae or not. The documentary evidence adduced by plaintiff was unsatisfactory; the witnesses, copies of whose depositions in a miscellaneous case were filed, not agreeing in their statements some saying that Mussumat Arzoopae had received the property as a marriage dowry, while others made no mention of this circumstance, and *all* said that she had received it from Gholam Mohamed Khan, but not one of them deposed that it had been bestowed on her by Foujdar Beebee; thus positively contradicting plaintiff's own statement: the singly admission of the defendant, Sirdar Beebee, contained in her petition in the miscellaneous cases, that Arzoopae was in possession of the property, was insufficient to establish the fact; the reports of the Nazir do not shew it. The purport of the *hibbehnameh* executed in favor of his wife, Pecaree Khanum, by the defendant, Kadir Buksh, and of the security bond executed by the latter in behalf of her husband, demonstrate that the property was the *paternal* inheritance of the defendant, Kadir Buksh Khan. The Nazir's schedule, being unauthenticated by the signature of any public officer, was of no value. The evidence of the witnesses produced by plaintiff, to prove his possession, was useless, when he had failed to prove the fact of the property having belonged to Mussumat Arzoopae. Indeed, in the reply, filed by the plaintiff, as defendant in the suit regarding mouzah Khirkhee, he had designated the property as *juddee*," which word signifies "descended from the *grandfather*." Had the property really belonged to Mussumat Arzoopae, the fact would assuredly have been mentioned in the previous litigation. In short, the Principal Sudder Ameen entertained no doubt, that the property had belonged to Kamyab Khan. As plaintiff rests his claim on the fact of the property having belonged to Mussumat Arzoopae, it is unnecessary at present to record any opinion as to the authenticity or otherwise of the *hibbehnameh* produced

by the defendant, Kadir Buksh Khan, in support of his claim to the whole of the property.

From this decision, the plaintiff appealed, both as regards the *merits* of the case, and, also, with reference to that part of the Principal Sudder Ameen's order, which charged him with the costs of five distinct fees of the defendants' pleaders.

The Court, having perused the evidence in the case, see no reason to differ from the conclusion arrived at by the Principal Sudder Ameen, that the property in dispute belonged to Kamyab Khan, and not to Mussumat Arzoopae, and they also concur with the lower Court, in opinion, that having found this fact, there was no necessity for recording any opinion regarding the *hibbeh-nameh*, on which the defendant, Kadir Buksh Khan, rests his claim to the entire property. But they disapprove of that portion of the Principal Sudder Ameen's order, which charges the fees of *five* of the defendants' pleaders to the plaintiff. The replies of the defendants, Ameer-ood-deen and Sirdar Beebee, and Fyayab Khan, &c. are substantially the same as the reply of the defendants, Kadir Buksh Khan and Peearee Khanum, and they all employed the same vakeel. The only *really* separate reply is that of the defendants, Moobaruk-oon-nissa and Fussee-oon-nissa, who also employed another vakeel. The filing of four separate replies by *one* vakeel, Dusondhee Ram, is evidently a device of the vakeel with a view to his own advantage, and to the enhancement of the plaintiff's costs. The Court have of late frequently had occasion to notice this dishonest practice on the part of the Zillah Court pleaders; and it is their determination to discountenance it, by visiting with their severe displeasure all pleaders so acting, a repetition of the offence will not be too gravely punished by the dismissal of the offender from his office. The Court are accordingly pleased so far to modify the decision of the Principal Sudder Ameen as to direct that the plaintiff be charged with the fees of no more than *two* pleaders on account of the defendants, viz. a *single* fee for the first pleader, Dusondhee Ram, and the same for the second pleader, Sheikh Kureem Buksh. The Court, further deem it equitable, in consideration of this vexatious and fraudulent proceeding on the part of the respondents, to charge them (with the exception of the respondents, Moobaruk-oon-nissa and Fussee-oon-nissa, who were not parties to the imposition), with the costs of this appeal.

The Court consider the conduct of the vakeel Dusondhee Ram in this case so reprehensible that they deem it necessary to instruct their register to call upon him for an explanation through the Zillah Judge, on receipt of which, the Court will pass such orders as may to them appear proper.

The 29th December, 1851.

Present : { A. W. BEGGIE, } *Judges,*
 { H. W. DEANE, }
 { S. S. BROWN, } *Offg. Judge.*

CASE No. 243 OF 1851. { *Special appeal from the decision of
J. S. Clarke, Esq., Judge of Azim-
gurh, dated 26th March 1851.*

HAJEE IMAM BUKSH AND OTHERS, (*Plaintiffs*), *Appellants*,
versus

RAMSUHAE MISSER AND OTHERS, (*Defendants*), *Respondents*.

For the report of this case see pages 33 and 34 of the printed decision for Zillah Azimgurh, for the current year.

A special appeal was admitted to determine, whether the reasons assigned by the Principal Sudder Ameen, and recognized by the Judge, as valid, for dismissing the plaintiffs' suit, are sufficient or otherwise.

The Court observe, that the Judge's summary of the Principal Sudder Ameen's reasons for dismissing the plaintiffs' suit is incorrect. The Principal Sudder Ameen's reasons for his order are to the following purport: "1st, that the Settlement Officer had excepted the land in question from the zemindar's right, and had fixed the rent at the *jumma purtee* rate, which allows no profit to the zemindars, and the *jummabundee* and half yearly papers had been prepared and published in conformity with this order; that from the time of Settlement, the plaintiffs had made no objection thereto, and it was therefore improper, after an interval, which all but barred the suit under the law of limitation, to allow them to question the propriety of the Settlement Officer's decision; 2nd, that in the suit preferred against the plaintiffs by the defendants, for the *zemindaree* rights, the former had pleaded the correctness of the Settlement Officer's decision in their favor, as zemindars, and the defendants suit was dismissed. The plaintiff's present suit, therefore, of which the object is to set aside the Settlement, cannot be entertained, the Settlement having been upheld by the judgment in the other case, the adjustment of the rates payable by the defendants, which is a matter comprehended in the act of Settlement, must be upheld likewise. In conclusion, the Principal Sudder Ameen was of opinion, that this suit was instituted by the plaintiffs in retaliation for the suit brought against them by the defendants for the *zemindaree*. It is clear therefore that the Principal Sudder Ameen did not, (as supposed by the Judge), dismiss the plaintiffs' suit because

he considered them to have "failed in bringing forward any sufficient or satisfactory evidence in support of their assertion," but on totally different grounds; nor can the Court acquiesce in the validity of the reasons assigned by the Principal Sudder Ameen for his decision. It by no means follows, as a necessary consequence of the Court's approval of the Settlement Officer's decision on the *zemindaree* question, that no subsidiary proceeding or order of the same functionary, passed under the provisions of Regulation VII. of 1822, may be called in question by the parties concerned. The decision of the Settlement Officer, regarding the *zemindaree* right, may be quite correct; yet, his determination, in regard to the rates payable by the defendants or any other persons in the village, may be *wrong*. The objection urged by the plaintiffs to the proceedings of the Settlement Officer is, that the two orders passed by him are inconsistent: that having decided that the *zemindaree* rights were vested in the plaintiffs, it was unjust to fix the rates of the defendants at a standard, which left the zemindars no profit on the land. This is a point which the Principal Sudder Ameen was quite competent to enter into, notwithstanding the decision passed by him in case No. 267, (page 32 of the printed decision): the Court further observe that, even admitting the *motives* attributed by the Principal Sudder Ameen to the plaintiffs in instituting this suit, this would be no sufficient reason for disallowing their claim, if otherwise just, and preferred, as this is admitted to have been, within the period prescribed by law. With reference to the foregoing observations, the Court are pleased to annul the decisions of the lower Courts, and to remand the case for retrial to the Court of first instance. The Principal Sudder Ameen will, in disposing of the case, exercise the authority clearly vested in the Civil Courts, by Section 9, Regulation XXX. of 1803, and Clause 1, Section 9, Regulation VII. of 1822, to adjust disputes between zemindars and cultivators regarding land rates.



The 31st December, 1851.

Present: { A. W. BEGBIE,
H. W. DRANE, } Judges,
S. S. BROWN, Offg. Judge.

CASE No. 198 of 1851. { *Special appeal from the decision of Doobé,
Jowala Pershad, Principal Sudder Ameen
of Azimgurh, dated 20th February 1851.*

GHOLAM JEERLANEE AND OTHERS, (Plaintiffs), Appellants,

versus

MUDONE, (Defendant), Respondent.

THE plaintiffs brought a suit to recover Rs. 13-9, on account of *purjote* dues claimable from the defendant from 1247 to 1250, Fuslee, and based their claim on the Settlement record. The Moonsiff passed a decree in favor of the plaintiffs.

The Principal Sudder Ameen, in appeal, reversed this decision.

A special appeal was allowed to try, whether the Principal Sudder Ameen was warranted in rejecting the claim of the appellants, on the ground that the name of the *individual* defendant was not inserted in the Settlement papers, the proceedings at Settlement having recognized, generally, the right contended for by the appellants.

The Court remark that the Principal Sudder Ameen, in the first part of his decree, has taken objection to the claim of the plaintiffs, because the name of the defendant does not appear in the Collector's register, and has gone on to say that the cess is altogether illegal, and not capable of being enforced by the Courts. Thus the weaker reason is put first, and the stronger last; and the last reason, if it be a good one, is of such force, that it renders any consideration arising out of the peculiar position of the defendant wholly superfluous. The Court find that the Collector at Settlement drew up a record of persons liable to pay according to local usage the ground rent claimed, and the Settlement having received the confirmation of Government, the cess is not illegal, but is of the class sanctioned under Clause 1, Section 9, Regulation VII. of 1822. The right to levy the tax having been thus declared by the Court, it becomes the duty of the Principal Sudder Ameen to determine, whether the defendant is liable to pay it. If the plaintiffs should establish to the Principal Sudder Ameen's satisfaction that the defendant has succeeded to the occupancy of a house, the occupant of which at the time of Settlement was taxed, in virtue of such occupancy, there can be no question but that the claim of the plaintiffs equally reaches

the defendant, just as it would have reached the recorded occupant.

The Court remand the suit to the Principal Sudder Ameen's file, that he retry it, with due regard to the above observation.

The 31st December, 1851.

Present: { A. W. BEGGIE,
H. W. DEANE, } Judges,
S. S. BROWN, Offg. Judge.

Case No. 208 of 1851. { Special appeal from the decision of Abdool
Azeez Khan, Principal Sudder Ameen of
Ghazeepore, dated 24th July 1851.

SHEODYAL SINGH AND OTHERS, (Defendants), Appellants,
versus

SHEIKH WAJID ALI AND OTHERS, (Plaintiffs), Respondents.

CLAIM, to recover Rs. 36, value of eighteen maunds of fish.

The plaintiffs brought a suit, as above, against thirty-seven persons. They set forth that they are the proprietors of the mouzah, and that the defendants unlawfully fished the streams in Poos and Magh 1257 Fuslee.

The lower Courts decreed in favor of the plaintiffs.

A special appeal was granted to determine, whether the Principal Sudder Ameen was not bound to pronounce on the genuineness, or otherwise, of the document on which the defendants rested their opposition to the claim.

The Court find it to have been alleged, in the defence to this action, that the defendants were the former owners of the village, that the ancestors of the plaintiffs sued the ancestors of the defendants for the *zemindaree* right, and that a confession of judgment was entered upon the written agreement, in 1814, of the then plaintiffs, that the defendants should continue to enjoy the *sayer* produce. The defendants asserted that their right, in virtue of this agreement, has ever since been recognized. The Moonsiff rejected the deed put in by the defendants; but the Principal Sudder Ameen has omitted to dispose of it, and has placed it aside, as a document to which no attention whatever is due, inasmuch as it is shown that the settlement was made with the plaintiffs, as proprietors, and that they are in possession of the *sayer* produce accordingly.

In the opinion of the Court, the Principal Sudder Ameen should have decided on the validity of the deed put in by the

defendants, as noticed in the certificate. The *zemindaree* right necessarily includes the right to the *sayer* produce, and the settlement record could not exhibit the one right separated from the other ; but if, in an action to recover the value of the *sayer* produce, it be pleaded that the inherent right to it was waived by special agreement in favor of the party resisting the claim, the Court is bound to enter on the proof adduced in support of the plea, and to determine whether such surrender of right really took place or not.

The Court remand the suit to the Principal Sudder Ameen, with directions that he re-try it, with reference to these remarks.

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Ex. 17-1-18

24

